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WILCOX & CO

No. 5744

United States Circuit Court of Appeals

For the Ninth Circuit.

ELECTRIC STEEL FOUNDRY, a Corporation,
Appellant,

vs.

CLYDE G. HUNTLEY, as Collector of United States Internal Revenue for the District of Oregon, and W. S. SHANKS, as Deputy Collector of United States Internal Revenue for the District of Oregon,
Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

D. J. MALARKEY and A. M. DIBBLE, 1512 Yeon Building, Portland, Oregon, and E. B. SEABROOK, 1225 Yeon Building, Portland, Oregon,

For the Appellant.

GEORGE NEUNER, United States Attorney for the District of Oregon, and FORREST E. LITTLEFIELD, Assistant United States Attorney for the District of Oregon, Old Post Office Building, Portland, Oregon, and GEORGE G. WITTER, Special Counsel, Bureau Internal Revenue, 703 Republic Building, Seattle, Washington,

For the Appellees.

In the District Court of the United States for the District of Oregon.

IN EQUITY—No. E.-8945.

ELECTRIC STEEL FOUNDRY, a Corporation,

Complainant,

vs.

CLYDE G. HUNTLEY, as Collector of United States Internal Revenue for the District of Oregon, and W. S. SHANKS, as Deputy Collector of the United States Internal Revenue for the District of Oregon,

Respondents.

CITATION ON APPEAL.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

To Clyde G. Huntley, as Collector of United States Internal Revenue for the District of Oregon, and W. S. Shanks, as Deputy Collector of United States Internal Revenue for the District of Oregon, Respondents Above Named, and to Messrs. George Neuner and Geo. S. Witter and Forrest E. Littlefield, Your Attorneys and Solicitors Herein, GREETING:

WHEREAS, Electric Steel Foundry, a corporation, the complainant above named has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, on December 26, 1928, and has given the security required by law,—

YOU ARE THEREFORE HEREBY CITED AND ADMONISHED to be and appear before said United States Circuit Court of Appeals for [1*] the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

GIVEN under my hand, at Portland, in said District, this 11th day of February, in the year of our Lord one thousand nine hundred and twenty-nine.

JOHN G. McNARY,
Judge.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy of the within and foregoing citation on appeal is hereby admitted at Portland, Oregon, this 11th day of February, 1929.

FORREST E. LITTLEFIELD,
Assistant U. S. Attorney,
Of Solicitors and Counsel for the Above-named Respondents and Appellees. [2]

[Endorsed]: Filed Feb. 11, 1929. [3]

In the District Court of the United States for the District of Oregon.

November Term, 1927.

BE IT REMEMBERED, That on the 28th day of December, 1927, there was duly filed in the District Court of the United States for the District of Oregon a bill of complaint, in words and figures as follows, to wit. [4]

In the District Court of the United States for the District of Oregon.

ELECTRIC STEEL FOUNDRY, a Corporation,
Complainant,

vs.

CLYDE G. HUNTLEY, as Collector of United States Internal Revenue for the District of OREGON, and W. S. SHANKS, as Deputy Collector of United States Internal Revenue for the District of Oregon,
Respondents.

COMPLAINT.

The complainant complains of respondents and for cause of suit alleges the following facts:

I.

During the times herein mentioned respondent Clyde G. Huntley was and now is the duly appointed, qualified and acting Collector of United States Internal Revenue for the District of Oregon and residing in the city of Portland, State of Oregon. And during said times respondent W. S. Shanks was and now is a duly appointed, qualified and acting Deputy Collector of United States Internal Revenue for the District of Oregon and residing in the said city of Portland.

II.

On September 26, 1925, the respondents, acting in their said official capacities, obtained and pro-

cured from complainant by means of fraud and duress, as hereinafter more particularly stated, the signature of complainant's secretary and the affixing of complainant's seal by said secretary to a certain document in writing concerning the collection of United States income taxes, in words [5] and figures as follows:

"September 26, 1925,
(Date)

INCOME AND PROFITS TAX WAIVER.

In order to enable the Bureau of Internal Revenue to give thorough consideration to any claims for abatement or credit filed by or on behalf of Electric Steel Foundry of Ft. of Salmon St., Portland, Oregon, covering any income, excess-profits or war-profits tax assessed against the said taxpayer under the existing or prior Revenue Acts for the year(s)—1918—, and to prevent the immediate institution of a proceeding for the collection of such tax prior to the expiration of the six year period of limitation after assessment within which a distraint or a proceeding in Court may be begun for the collection of the tax, as provided in Section 278 (d) of the existing Revenue Act, the said taxpayer hereby waives any period of limitation as to the time within which distraint or a proceeding in Court may be begun for the collection of the tax, or any portion thereof, assessed for the said year(s), and hereby consents to the collection thereof by distraint or a proceeding in court begun at any time prior to the expiration of this waiver.

This waiver is in effect from the date it is signed and will remain in effect until December 31, 1926.

ELECTRIC STEEL FOUNDRY,

Taxpayer.

By GEO. F. SCHOTT, Sect. (Corporate Seal)

If this waiver is executed in behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporations, in addition to which, the seal, if any, of the corporation must be affixed."

III.

Said document was executed and signed by Geo. F. Schott, secretary of complainant, and complainant's seal affixed thereto, under the following circumstances and not otherwise:

On May 9, 1919, complainant filed with the Collector of United States Internal Revenue for the District of Oregon a return of its income taxes for the year 1918, showing a tax due the United [6] States of $345,095.39, which sum was assessed on July 24, 1919, as the tax due, of which complainant paid the sum of $217,592.11, leaving a balance unpaid of the sum of $127,503.28; and complainant thereupon filed a claim of abatement of said balance, and on December 8, 1924, abatement thereof in the sum of $24,970.08 was allowed by the Internal Revenue Department of the United States.

No other or further assessment or determination of taxes due under said return was made until and on February 8, 1924, when the United States Com-

missioner of Internal Revenue levied and assessed an additional tax on said return of $51,556.79.

On January 22, 1924, complainant and said commissioner, entered into a waiver agreement in words and figures as follows:

"IT:CR:C
FLH January 22, 1924
Parent. (date)

INCOME AND PROFITS TAX WAIVER.

In pursuance of the provisions of subdivision (d) of Section 250 of the Revenue Act of 1921, Electric Steel Foundry, of Portland, Oregon, and the Commissioner of Internal Revenue, hereby consent to a determination, assessment and collection of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of the said Electric Steel Foundry for the year 1918 under the Revenue Act of 1921, or under prior income, excess-profits, or war-profits tax Acts, or under Section 38 of the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes.' Approved August 5, 1909. This waiver is in effect from the date it is signed by the taxpayer and will remain in effect for a period of one year after the expiration of the statutory period of limitation, or the statutory period of limitation as extended by any waivers already on file with the Bureau, within which assessments of taxes may be

made for the year or years mentioned. Limited to March 15, 1925.

ELECTRIC STEEL FOUNDRY,
Taxpayer.
By GEO. F. SCHOTT, Sect.

If this waiver is executed in behalf of a corporation, it must be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed." [7]

No additional or other assessments or determination of taxes due under said return for 1918 was made within the period consented to in said waiver agreement last above described, and on March 15, 1925, when said waiver agreement expired, said taxes and additional taxes, so assessed and determined within five years from the filing of said return, and the collection thereof, were barred by the statute of limitation prescribed by the Revenue Act of Congress of 1918, and the Revenue Act of Congress of 1921, and the Revenue Act of Congress of 1924.

On September 25, 1925, respondent Collector, acting through his deputy John W. Cochran, issued to respondent W. S. Shanks a distraint warrant, a substantial copy of which is attached hereto and marked Exhibit "A," commanding said Shanks to collect the said balance of taxes for 1918 amounting to $127,503.28 and interest thereon amounting to $44,607.07, aggregating $172,110.35, and to distrain the property of complainant for the said purpose,

notwithstanding the assessment and collection of said taxes were barred by the said statutes of limitations. And on September 26, 1925, said Shanks served said distraint warrant upon complainant's secretary, Geo. F. Schott, in the city of Portland, Oregon, and at the same time handed to complainant's said secretary the said document set out in Paragraph II hereof, except that the same was not then signed or sealed.

Said Shanks, thereupon, demanded of said Schott that complainant immediately pay the amount of said distraint warrant, to wit: The sum of $172,-110.35, or, as an alternative, that he sign and seal said waiver on behalf of complainant, and thereupon said Shanks threatened said Schott that unless he immediately complied with one or the other of said demands that he, said Shanks, [8] under said distraint warrant, would take possession of the plant, factory and property of the complainant and sell the same to recover the amount of said warrant.

Said Schott asked of said Shanks a reasonable time to consult complainant's legal advisers, but the same was refused; he then asked time until the next day when the president and executive head manager of complainant would be present—he being absent from the city of Portland, Oregon, at that time—and the matter could be submitted to him, but that request was likewise refused.

The complainant was then the owner and in possession of valuable property consisting of its foundry, factory, buildings, furnaces, equipment, tools

and implements as well as a large stock of raw materials and manufactured products, all being situated in said city of Portland, Multnomah County, State of Oregon, and being the plant and instrumentalities with which complainant carried on its business, and all of great value, but which under forced sale by said Collector under said distraint warrant would not realize or bring more than one-third of its actual value, all of which was then well known to said Schott.

Said Schott also then well knew and it is a fact that the carrying out of this threat of taking possession of said property by said Shanks and selling the same thereunder would ruin complainant and render it insolvent and the effect of said threat was to deprive said Schott of any ability to act according to his own will and judgment, and so frightened and scared said Schott that he permitted said Shanks to substitute his will for that of said Schott and compel said Schott to act contrary to his own wishes and will and according to that of said Shanks, and, thereupon, said Schott, without any authority whatever from the Board of Directors of the complainant or from the president or manager of complainant, but solely by reason of the said threat of said Shanks, signed said document on behalf of complainant and attached complainant's seal [9] thereto. That said document was not signed or executed by or on behalf of this complainant otherwise than as stated herein.

IV.

Complainant has not at any time authorized the

execution of said waiver agreement by said Schott and has not ratified or confirmed the same in any way.

V.

On said September 25, 1925, the Revenue Act of Congress of 1924, which was enacted on June 6, 1924, was in full force and effect and all previous Revenue Acts of Congress had been repealed. Said Revenue Act of 1924 by Section 277 (a), sub. (2) thereof, provided as follows:

> "Except as provided in Section 278 and in subdivision (b) of Section 274 and in subdivision (b) of Section 279—
>
> (2) The amount of income, excess profits, and war profits taxes imposed by the Act entitled 'An Act to provide revenue, equalize duties, and encourage the industries of the United States, and for other purposes,' approved August 5, 1909, the Act entitled 'An Act to reduce tariff duties and to provide revenue for the Government, and for other purposes,' approved October 3, 1913, the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period."

And said Revenue Act of 1924 by Section 278 subdivision (c) and (e) thereof provided as follows:

> "(c) Where both the Commissioner and the taxpayer have consented in writing to the as-

sessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon."

"(e) This section shall not (1) authorize the assessment of a tax or the collection thereof by distraint or by a proceeding in court if at the time of the enactment of this Act such assessment, distraint, or proceeding was barred by the period of limitation then in existence, or (2) affect any assessment made, or distraint or proceeding in court begun, before the enactment of this Act."

There is no provision of any kind in said Revenue Act of 1924 authorizing the exaction or giving of said document, described in paragraph II hereof, or giving the same any effect whatever. [10]

WHEREFORE, complainant prays for a decree of this Court that said document described in paragraph II of this complaint dated September 26, 1925, be cancelled and held for naught; and that plaintiff have such other and further relief as to this Court may seem equitable in the premises.

MALARKEY, SEABROOK & DIBBLE.

MALARKEY, SEABROOK & DIBBLE,
Attorneys and Solicitors for Complainant. [11]

EXHIBIT "A."

WARRANT FOR DISTRAINT.

Balance Forward	Date	Charge	Last Credit	Unpaid Balance	Account Number & Remarks
				127,503.28	40116—1919 1918 Income Tax Abatement Claim filed 12–13–19 still pending (This warrant is issued in accordance with A & C Mim. #3341 dated Sept. 1, 1925) Date of first notice: 9–15–19 Date of second notice:

Electric Steel Foundry,
Ft. Salmon St.,
Portland, Oregon.

To W. S. Shanks, Deputy Collector:

WHEREAS in pursuance of the provisions of the Acts of Congress relating to internal revenue the above named person or persons is or are liable to pay the tax or taxes assessed against him, or them, in the amount or amounts named hereinbelow, together with penalties and interest prescribed by law for failure to pay said tax or taxes when the same become due; and WHEREAS, ten days have elapsed since notice was served and demand made upon said person or persons for payment of said tax or taxes; AND WHEREAS, said person or persons still neglect or refuse to pay the same; You are hereby commanded to levy upon, by distraint, and to sell so much of the goods, chattels, effects, or other property or rights to prop-

erty, including stocks, securities, and evidences of debt, of the person or persons liable as aforesaid, or on which a lien exists for the tax or taxes, as may be necessary to satisfy the tax or taxes, with 5 per centum additional upon the amount of the tax or taxes, and interest at the rate of 1 per centum per month from the time the tax or taxes became due, and also such further sum as shall be sufficient for the fees, costs, and expenses of the levy; but if sufficient goods, chattels or effects are not found, then you are hereby commanded to seize and sell in the manner prescribed by law so much of the real estate of said person or persons, or on which a lien exists, as may be necessary for the purposes aforesaid. You will do all things necessary to be done in the premises and strictly comply with all requirements of law, and for so doing this shall be your warrant, of which make due return to me at this office on or before the sixtieth day after the execution hereof. [12]

Tax	127,503.28
Penalty of 5 per centum	.....
Interest for 72 months and —— days (on $41,229.44) ¢ ½% per mo.	
Interest for 69 months (on $86,273.84)	44,607.07
Total tax, penalty and interest due on date of second notice	172,110.35
Amount of additional interest due from date of second notice	

WITNESS my hand and official seal at Portland, Oregon, this 25th day of September, 1925.

JOHN W. COCHRAN,
Collector of Internal Revenue,
Deputy Collector in Charge.
Internal Revenue Collection District of Oregon.

Filed December 28, 1927. [13]

AND AFTERWARDS, to wit, on the 17th day of September, 1928, there was duly filed in said court a motion to dismiss the bill of complaint, in words and figures as follows, to wit: [14]

[Title of Court and Cause.]

MOTION TO DISMISS BILL OF COMPLAINT.

Come now the defendants by their attorney, Forrest E. Littlefield, Assistant United States Attorney for the District of Oregon, and move the Court for an order dismissing the bill of complaint herein on the ground and for the reason that the United States is an indispensable party defendant to this suit and that the United States cannot be made a party defendant herein for the reason that it has not consented to be made such party defendant.

FORREST E. LITTLEFIELD,
Assistant United States Attorney for the District of Oregon.

United States of America,
District of Oregon,—ss.

Due and legal service of the within motion is hereby admitted and accepted within the State and District of Oregon, on the 18th day of September, 1928, by receiving a copy thereof duly certified to as a true and correct copy of the original by Forrest E. Littlefield, Assistant United States Attorney for the District of Oregon.

E. B. SEABROOK,
Of Attorneys for Complainant.

Filed September 17, 1928. [15]

AND AFTERWARDS, to wit, on Monday, the 29th day of October, 1928, the same being the 92d judicial day of the regular July Term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [16]

[Title of Court and Cause.]

MINUTES OF COURT—OCTOBER 29, 1928—ORDER SUSTAINING MOTION TO DISMISS BILL OF COMPLAINT.

This cause was heard by the Court upon the motion of the defendant to dismiss the bill of complaint in said cause, and was argued by Mr. E. B.

Seabrook, of counsel for plaintiff, and Mr. George G. Witter, Special Assistant to the Attorney General, and Mr. Forrest E. Littlefield, Assistant United States Attorney. Upon Consideration whereof, IT IS ORDERED that said motion be, and the same is hereby, sustained. [17]

AND AFTERWARDS, to wit, on the 22d day of November, 1928, there was duly filed in said court a petition for rehearing, in words and figures as follows, to wit: [18]

[Title of Court and Cause.]

PETITION FOR REHEARING UNDER EQUITY RULE No. 69.

To the Honorable ROBERT S. BEAN, Judge of the Above Court:

The petition of the complainant, Electric Steel Foundry, showeth unto your Honor that, being aggrieved by the opinion and decision rendered herein sustaining the motion to dismiss the bill of complaint on October 29, 1928, whereby petitioner's bill of complaint is or will be dismissed, in rendering said opinion and decision the Court committed error in law, and overlooked and failed to consider material matters as follows:

The Court overlooked and failed to consider that the only right or interest that the Government had in the subject matter of the suit, i. e., the waiver, was acquired solely by the admitted fraudulent

acts of defendants complained of in the complaint; and it being admitted on the record that such acts were fraudulent defendants were not and could not be representatives of the Government and what they did could not and did not confer any rights or interest on the Government. [19]

The Court overlooked and failed to consider that the Collector is personally liable to the Government for the tax and if he failed to collect same the Government could collect it from him. And that the Collector obtained the waiver by duress to serve his personal ends in saving him from liability for the tax, and that, therefore, he has a personal interest in the result of this suit.

WHEREFORE petitioner humbly prays that your Honor will grant a rehearing, humbly submitting to such orders as the Court may make if this application be without merit.

MALARKEY, SEABROOK & DIBBLE,
Attorneys for Complainant.

State of Oregon,
County of Multnomah,—ss.

Due and legal service of the within paper in Multnomah County Oregon, this 22d day of November, 1928, is hereby admitted.

J. W. McCULLOCH,
Assistant U. S. Attorney.

[Endorsed]: Filed November 22, 1928. [20]

AND AFTERWARDS, to wit, on Monday, the 3d day of December, 1928, the same being the 20th judicial day of the regular November term of said court—Present, the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [21]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 3, 1928—ORDER DENYING PETITION FOR REHEARING OF MOTION TO DISMISS BILL OF COMPLAINT.

Now, at this day, IT IS ORDERED that plaintiff's petition for a rehearing of defendant's motion to dismiss the bill of complaint herein be, and the same is hereby, denied. [22]

AND AFTERWARDS, to wit, on Wednesday, the 26th day of December, 1928, the same being the 37th judicial day of the regular November term of said court—Present the Honorable ROBERT S. BEAN, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [23]

[Title of Court and Cause.]

MINUTES OF COURT—DECEMBER 26, 1928 —ORDER DISMISSING BILL OF COMPLAINT.

This cause came regularly on to be heard on Monday, October 22, 1928, on motion of defendants for an order dismissing the bill of complaint herein on the ground and for the reason that the United States is an indispensable party defendant to this suit and cannot be made such party defendant.

Plaintiff appeared by its attorney, E. B. Seabrook, and defendants appeared by George G. Witter, Special Attorney for the Bureau of Internal Revenue, and Forrest E. Littlefield, Assistant United States Attorney for the District of Oregon, and, the said motion having been argued by counsel and taken under advisement, the Court on the 29th day of October, 1928, sustained said motion; plaintiff herein filed a petition for rehearing on November 22, 1928, which said petition for rehearing was denied by the Court on December 3, 1928;

Now at this time, the Court being fully advised in the premises,—

IT IS ORDERED AND ADJUDGED that the bill of complaint herein be, and the same is hereby, dismissed, and that defendant recover of and from plaintiff their costs and disbursements incurred herein, taxed at $10.00.

Dated at Portland, Oregon, this 26th day of December, 1928.

R. S. BEAN,
District Judge.

Filed December 26, 1928. [24]

AND AFTERWARDS, to wit, on the 11th day of February, 1929, there was duly filed in said court a petition for appeal, in words and figures as follows, to wit: [25]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable Judges of the Above-entitled Court:

The above-named Electric Steel Foundry, a corporation, complainant above named, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the 26th day of December, 1928, wherein and whereby it was ordered and adjudged that the bill of complaint of said complainant be dismissed and that respondents above named recover of and from said complainant their costs and disbursements incurred herein, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and said complainant prays that its appeal be allowed and that citation be issued, as provided by law, and that a transcript of the rec-

ord, proceedings and documents upon which said decree was based, duly authenticated, be sent to said United [26] States Circuit Court of Appeals for the Ninth Circuit, sitting at the city of San Francisco in the State of California, under the rules of such court in such cases made and provided.

And your petitioner, said complainant, further prays that a proper order relating to the required security to be required of it be made.

Dated at Portland, Oregon, this 11th day of February, 1929.

MALARKEY & DIBBLE.
MALARKEY & DIBBLE,
Solicitors and Counsel for Said Complainant and Petitioner.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy of the within and foregoing petition for appeal is hereby admitted at Portland, Oregon, this 11th day of February, 1929.

FORREST E. LITTLEFIELD.
FORREST E. LITTLEFIELD,
Assistant U. S. Attorney,
Of Solicitors and Counsel for Respondents Above Named.

Filed February 11, 1929. [27]

AND AFTERWARDS, to wit, on the 11th day of February, 1929, there was duly filed in said court an assignment of errors, in words and figures as follows, to wit: [28]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Now comes Electric Steel Foundry, a corporation, the complainant in the above-entitled court and cause, and, contemporaneously with the making and filing of its petition for appeal herein, files therewith the following assignments of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the 26th day of December, 1928.

I.

That the United States District Court for the District of Oregon erred in holding and decreeing that the United States is a necessary and indispensable party to this suit and, since it cannot be sued, that this suit should be dismissed.

II.

That the United States District Court for the District of Oregon erred in holding and decreeing that this suit involves the right or title to Government property of the United States, [29] making the United States a necessary and indispensable party.

III.

That the United States District Court for the

District of Oregon erred in holding and decreeing, under the facts admitted by the motion to dismiss the bill of complaint, that the waiver referred to in the pleadings in this suit constitutes or is property and in holding and decreeing that it constitutes property belonging to the United States or in which it has or should have or claim any interest or benefit.

IV.

That the United States District Court for the District of Oregon erred in holding and decreeing, under the facts admitted by the motion to dismiss the bill of complaint, that the waiver referred to in the pleadings in this suit was made for the use and benefit of the United States Government and that the latter could equitably or otherwise claim any interest in or benefit from said waiver or claim to be deprived of any of its rights or interests by the maintenance and prosecution of this suit without its being made a party thereto.

V.

That the United States District Court for the District of Oregon in holding and decreeing, under the facts admitted by the motion to dismiss the bill of complaint, that the waiver referred to in the pleadings in this suit has a face value and that such face value must be assumed.

VI.

That the United States District Court for the District of Oregon erred in holding and decreeing, under the facts admitted [30] by the motion to

dismiss the bill of complaint, that the waiver referred to in the pleadings in this suit has a face value belonging to the United States Government and that respondents have no interest therein.

VII.

That the United States District Court for the District of Oregon erred in holding and decreeing, under the facts admitted by the motion to dismiss the bill of complaint, that respondents have no personal interest in the result of this suit and that a decree against them would not be binding on the United States Government.

VIII.

That the United States District Court for the District of Oregon erred in sustaining respondents' motion to dismiss complainant's bill of complaint and in rendering and entering on the 26th day of December, 1928, a final order and judgment and decree in this suit, wherein and whereby it was ordered and adjudged that the bill of complaint herein be dismissed and that respondents recover of and from complainant their costs and disbursements incurred herein.

IX.

That the United States District Court for the District of Oregon erred in not denying respondents' motion to dismiss complainant's bill of complaint and in not holding and decreeing that from the facts admitted by said motion and apparent on the face of the record the United States Government had no right or title or interest in or to said

waiver or the subject of this suit and was not a necessary or indispensable party thereto. [31]

WHEREFORE the above-named complainant and appellant prays that said decree of the District Court of the United States for the District of Oregon rendered and entered on said December 26, 1928, be reversed and for the entry of a decree herein in favor of complainant and for such other and further relief as to the Court may seem equitable and proper.

MALARKEY & DIBBLE.
MALARKEY & DIBBLE,
Solicitors and Counsel for Complainant and Appellant.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy of the within and foregoing assignment of errors is hereby admitted at Portland, Oregon, this 11th day of February, 1929.

FORREST E. LITTLEFIELD.
FORREST E. LITTLEFIELD,
Assistant U. S. Attorney,
Of Solicitors and Counsel for Respondents and Appellees Above Named.

Filed February 11, 1929. [32]

AND AFTERWARDS, to wit, on Monday, the 11th day of February, 1929, the same being the 71st judicial day of the regular November term of said court—Present, the Honorable JOHN H. McNARY, United States District Judge, presiding—the following proceedings were had in said cause, to wit: [33]

[Title of Court and Cause.]

MINUTES OF COURT—FEBRUARY 11, 1929—
ORDER ALLOWING APPEAL.

On motion of A. M. Dibble, one of the solicitors and of counsel for the complainant above named, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the decree heretofore filed and entered herein on December 26, 1928, be and the same is hereby allowed, and that a transcript of the record and of all of the proceedings and documents upon which said decree was based, duly certified and authenticated, as provided by law, be forthwith transmitted to said United States Circuit Court of Appeals for he Ninth Circuit. It is further ordered that the bond on appeal be and the same is hereby fixed at the sum of $500.00.

Dated this 11th day of February, 1929.

JOHN H. McNARY.

JOHN H. McNARY.
District Judge.

Filed February 11, 1929. [34]

AND AFTERWARDS, to wit, on the 11th day of February, 1929, there was duly filed in said court a bond on appeal, in words and figures as follows, to wit: [35]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Electric Steel Foundry, a corporation duly organized and existing under the laws of the State of Oregon, as principal, and C. F. Swigert and W. G. Swigert, of the city of Portland, county of Multnomah and State of Oregon, as sureties, are held and firmly bound unto the above-named Clyde G. Huntley and W. S. Shanks, the respondents in the above-entitled court and cause in the sum of $500.00 lawful money of the United States, to be paid to them and their respective executors, administrators, heirs and assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, administrators, successors and assigns by these presents.

Sealed with our seals and dated this 11th day of February, 1929.

WHEREAS the above-named Electric Steel Foundry, a corporation, the complainant in the above-entitled court and cause, [36] has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the de-

cree of the District Court of the United States for the District of Oregon, rendered and entered in the above-entitled cause on December 26, 1928;

NOW, THEREFORE, the condition of this obligation is such that if the above-named Electric Steel Foundry, a corporation, shall prosecute its said appeal to effect and answer all costs if it fails to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

ELECTRIC STEEL FOUNDRY, a Corporation, (Corporate Seal)
Principal.
By C. F. SWIGERT,
President.
C. F. SWIGERT, (Seal)
W. G. SWIGERT, (Seal)
Sureties. [37]

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

On the 11th day of February, 1929, personally appeared before me C. F. Swigert and W. G. Swigert, respectively known to me to be the persons described in and who duly executed, as sureties, the foregoing bond on appeal, and respectively acknowledged, each for himself, that they executed the same as their free act and deed for the purposes therein set forth. And the said C. F. Swigert and W. G. Swigert, being respectively by me duly sworn, says, each for himself and not for the other, that he is a resident and freeholder of the

said county of Multnomah and that he is worth the sum of $1,000.00 over and above his just debts and legal liability and property exempt from execution.

C. F. SWIGERT.
W. G. SWIGERT.

Subscribed and sworn to before me this 11th day February, 1929.

[Seal] A. M. DIBBLE,
Notary Public for Oregon.

My commission expires July 1, 1932.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy of the within and foregoing bond on appeal is hereby admitted at Portland, Oregon [38] this 11th day of February, 1929, and said bond is hereby acknowledged to be satisfactory to respondents.

FORREST E. LITTLEFIELD.
FORREST E. LITTLEFIELD,
Assistant U. S. Attorney,
Of Solicitors and Counsel for Respondents Above Named.

The within and foregoing bond on appeal is approved both as to sufficiency and form this 11th day of February, 1929.

JOHN H. McNARY.
JOHN H. McNARY,
District Judge.

Filed February 11, 1929. [39]

AND AFTERWARDS, to wit, on the 11th day of February, 1929, there was duly filed in said court a praecipe for transcript, in words and figures as follows, to wit: [40]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You are hereby directed to please prepare and certify the record in the above cause for transmission to the United States Circuit Court of Appeals for the Ninth Circuit, including therein a certified copy of all papers filed and proceedings had in the above-entitled cause, which are necessary to a determination thereof in said Appellate Court and especially including therein the following documents:

(1) Complaint.
(2) Motion to dismiss bill of complaint.
(3) Decision of the Court rendered Octotber 29, 1928.
(4) Petition for rehearing of motion to dismiss bill of complaint.
(5) Order dismissing bill of complaint rendered and entered December 26, 1928. [41]
~~(6) Cost bill.~~
(9) Petition for appeal.
(10) Assignment of errors.
(11) Bond on appeal.
(12) Order allowing appeal.

(13) Citation on appeal, and

(14) This praecipe.

Dated at Portland, Oregon, this 11th day of February, 1929.

MALARKEY & DIBBLE.
MALARKEY & DIBBLE,

Solicitors and Counsel for Said Complainant and Plaintiff in Error.

United States of America,
State and District of Oregon,
County of Multnomah,—ss.

Due, timely and legal service by copy of the within and foregoing praecipe is hereby admitted at Portland, Oregon, this 11th day of February, 1929.

FORREST E. LITTLEFIELD.
FORREST E. LITTLEFIELD,
Assistant U. S. Attorney,

Of Solicitors and Counsel for Respondents and Defendants in Error.

Filed February 11, 1929. [42]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages, numbered

from 4 to 42, inclusive, constitute the transcript of record upon the appeal in a cause in said court, in which Electric Steel Foundry, a corporation, is plaintiff and appellant, and Clyde G. Huntley, as Collector of United States Internal Revenue for the District of Oregon, and W. S. Shanks, as Deputy Collector of United States Internal Revenue for the District of Oregon, are defendants and appellees; that the said transcript has been prepared by me in accordance with the praecipe for transcript filed by said appellant and is a full, true and complete transcript of the record and proceedings had in said court in said cause, in accordance with the said praecipe as the same appear of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $6.60, and that the same has been paid by the said appellant.

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, at Portland, in said District, this 27th day of February, 1929.

[Seal] G. H. MARSH,
Clerk. [43]

[Endorsed]: No. 5744. United States Circuit Court of Appeals for the Ninth Circuit. Electric Steel Foundry, a Corporation, Appellant, vs. Clyde G. Huntley, as Collector of United States Internal Revenue for the District of Oregon, and W. S. Shanks, as Deputy Collector of United States In-

ternal Revenue for the District of Oregon, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Oregon.

Filed March 1, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5744

United States Circuit Court of Appeals

For the Ninth Circuit

ELECTRIC STEEL FOUNDRY, a Corporation,
Appellant,

vs.

CLYDE G. HUNTLEY, as Collector of United States Internal Revenue for the District of Oregon, and W. S. SHANKS, as Deputy Collector of United States Internal Revenue for the District of Oregon,
Appellees.

Brief of Appellant

Upon Appeal from the United States District Court for the District of Oregon.

D. J. Malarkey, E. B. Seabrook and A. M. Dibble,
Attorneys for Appellant.

George Neuner, U. S. Attorney for District of Oregon, Forrest E. Littlefield, Asst. U. S. Attorney for District of Oregon, and George G. Witter, Special Counsel, Bureau Internal Revenue,
Attorneys for Appellees.

JAMES, KERNS & ABBOTT CO. PORTLAND

SUBJECT INDEX

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FEDERAL STATUTES

No. 5744

United States
Circuit Court of Appeals
For the Ninth Circuit

ELECTRIC STEEL FOUNDRY, a Corporation,
Appellant,

vs.

CLYDE G. HUNTLEY, as Collector of United States Internal Revenue for the District of Oregon, and W. S. SHANKS, as Deputy Collector of United States Internal Revenue for the District of Oregon,

Appellees.

Brief of Appellant

Upon Appeal from the United States District Court for the District of Oregon.

STATEMENT OF THE CASE.

This is a suit in equity brought by appellant, Electric Steel Foundry, an Oregon corporation, doing business in the City of Portland, Oregon, against appellees, Clyde G. Huntley and W. S. Shanks, who are the Collector and Deputy Collector respectively of United States Internal

Revenue for the District of Oregon, to set aside and cancel and hold for naught a certain purported income and profits tax waiver which said appellees on September 26, 1925, induced and procured the secretary of said appellant, Geo. F. Schott, to sign in its behalf.

It is alleged in appellant's bill of complaint, which is set forth in full from pages 4 to 15, both inclusive, of the transcript of record, that said purported income and profits tax waiver should be canceled and annulled and held for naught for the reasons that the collection of the income tax in question was, under the existing Internal Revenue Acts of the United States and the decisions of the courts construing and applying said revenue acts, barred by the statute of limitations, and that the said purported income and profits tax waiver should be canceled and annulled and held for naught because said appellees fraudulently and wrongfully and in violation of law, and in excess of their legal rights and duties, and by means of duress coerced and compelled the said secretary of appellant to sign the said purported income and profits tax waiver, which appellant seeks by this suit to have voided and set aside.

The said purported income and profits tax waiver relates to the federal income tax of said appellant for the year, 1918, and we will here set down for the convenience of the court, in chronological order, everything that has transpired since the accrual of said tax for said year, 1918, up to the present time, so far as the same is germane to the decision of the questions presented by this appeal. It will develop in the course of the argument of the questions presented by this appeal that the dates hereinafter stated are of very vital and significant importance, especially as the same relate to the contention of appellant that the collection of any further income taxes of said appellant

for said year, 1918, is absolutely barred by the statute of limitations.

On May 9, 1919, appellant duly filed its income tax return for the said year, 1918, showing a tax due the United States of $345,095.39, and on July 24, 1919, said sum was assessed by the United States as the tax due, of which appellant paid $217,592.11, leaving a balance of $127,503.28, and appellant thereupon filed a claim of abatement of said balance;

On January 22, 1924, appellant and the United States Commissioner of Internal Revenue entered into a certain waiver agreement in words and figures as set forth at pages 7 and 8 of the transcript of record. Under said last mentioned waiver agreement it was provided that the period of time within which the United States might collect any additional assessment under said 1918 tax return of appellant was extended beyond the statutory period of limitation *but in no event beyond the express limited date therein specified, namely, March 15, 1925;*

No other or further assessment or determination of the income taxes due or claimed to be due under said return, made as aforesaid on May 9, 1919, was made until February 8, 1924, when the United States Commissioner of Internal Revenue levied and assessed an additional tax on said return of $51,556.79, and on December 8, 1924, an abatement of the said balance of $127,503.28 in the sum of $24,970.08 was allowed by the Internal Revenue Department of the United States;

Although under the internal Revenue Acts applicable to the collection from appellant of the income taxes due or claimed to be due and payable from said appellant to the United States for said year, 1918, as construed and applied by the decisions of the courts, the collection of the

said two assessments, which were made, as aforesaid, within five years from the date of the filing of the return, was barred by the statute of limitations five years after the date when said appellant filed its said income tax return for said year, 1918, which would be five years from said May 9, 1919, or May 9, 1924, said appellee, Huntley, on September 25, 1925, or more than sixteen months after the collection by the United States government from said appellant of said income taxes for said year, 1918, was barred by the statute of limitations, acting through his deputy, Cochran, wrongfully and unlawfully, and in excess of his legal rights and authority—the collection of any further income taxes for said year, 1918, being already barred by the statute of limitations—issued to appellee, Shanks, a distraint warrant (a substantial copy of which is set forth at pages 13 to 15 both inclusive of the transcript of record), commanding said appellee, Shanks, to collect said alleged balance of taxes for said year, 1918, amounting to said sum of $127,503.28 and interest thereon amounting to $44,607.07 aggregating $172,110.35, and to distrain the property of appellant for said purpose, notwithstanding the fact that the collection of said income taxes for said year, 1918, so sought to be collected, became barred by the statute of limitations on May 9, 1924.

And on September 26, 1925, said appellee, Shanks, served said distraint warrant, wrongfully issued as aforesaid, upon appellant's said secretary, and at the same time handed to the latter the said purported income and profits tax waiver, which appellant seeks by this suit to have cancelled and annulled and held for naught;

The said purported income and profits tax waiver which appellant seeks to have voided and cancelled by this suit was signed on September 26, 1925, by the said secre-

tary of appellant, and although the same is set forth in full from pages 5 to 6 of the transcript of record it will, for convenience, be here set forth again. Said purported income and profits tax waiver is in words and figures as follows:

"September 26, 1925

"Income and Profits Tax Waiver.

"In order to enable the Bureau of Internal Revenue to give thorough consideration to any claims for abatement or credit filed by or on behalf of Electric Steel Foundry of Ft. of Salmon St., Portland, Oregon, covering any income, excess-profits or war-profits tax assessed against the said taxpayer under the existing or prior Revenue Acts for the year(s)—1918—, and to prevent the immediate institution of a proceeding for the collection of such tax prior to the expiration of the six year period of limitation after assessment within which a distraint or a proceeding in Court may be begun for the collection of the tax, as provided in Section 278 (d) of the existing Revenue Act, the said taxpayer hereby waives any period of limitation as to the time within which distraint or a proceeding in Court may be begun for the collection of the tax, or any portion thereof, assessed for the said year(s), and hereby consents to the collection thereof by distraint or a proceeding in Court begun at any time prior to the expiration of this waiver. This waiver is in effect from the date it is signed and will remain in effect until December 31, 1926. (Signed) Electric Steel Foundry, Taxpayer, by Geo. F. Schott, Sect. (Corporate Seal);"

It is alleged in appellant's bill of complaint, and all of the facts therein alleged must be taken and conclusively deemed to be true and absolutely binding upon the court in its determination of the merits of this appeal, that not only was the issuance of said distraint warrant unlawful and in excess of the rights and duties of said appellee,

Huntley, and in positive violation of the rights of said appellant, but that said purported income and profits tax waiver was at the time of its execution absolutely void and ineffectual upon its face for the reason that the collection of any further income taxes from said appellant for said year, 1918, was absolutely barred by the statute of limitations, and that the said secretary of appellant was fraudulently and wrongfully induced and procured and by duress coerced into signing said alleged waiver in behalf of appellant.

The bill of complaint sets forth in detail the facts upon which it is claimed that said secretary was fraudulently and wrongfully induced and procured and coerced into signing said alleged waiver, and among other facts alleged and set forth in appellant's bill of complaint are the following:

That when said appellee, Shanks, served said distraint warrant on September 26, 1925, he demanded of said secretary of appellant that the latter immediately pay the amount of said distraint warrant, to wit, the sum of $172,-110.35, or as an alternative that he, the said secretary, sign and seal said alleged waiver of date September 26, 1925, on behalf of appellant, and, thereupon, said appellee, Shanks, threatened said secretary that unless he immediately complied with one or the other of said demands that he, said appellee, Shanks, under said distraint warrant, would take possession of the plant, factory and property of appellant and forthwith sell the same to recover the amount of said warrant;

That said secretary asked of said appellee, Shanks, a reasonable time to consult appellant's legal advisers, but the same was refused; he then asked time until the next

day when the President and executive head manager of appellant would be present—he being absent from the city of Portland at that time—and the matter could be submitted to him, but that request was likewise refused;

That appellant was then the owner and in possession of valuable property consisting of its foundry, factory, buildings, furnishings, equipment, tools and implements, as well as a large stock of raw materials and manufactured products, all being in Portland, Oregon, and being the plant and instrumentalities with which appellant carried on its business, and all of great value, but which under forced sale by said Collector, under said distraint warrant, would not realize or bring more than one-third of its actual value, all of which was then well known to said secretary;

That said secretary also then well knew, and it was and is a fact, that the carrying out of said threat of taking possession of said property by said appellee, Shanks, and selling the same thereunder, would ruin appellant and render it insolvent, and the effect of said threat was to deprive said secretary of any ability to act according to his own will and judgment, and so frightened and scared said secretary that he permitted said appellee, Shanks, to substitute his will for that of said secretary and compel said secretary to act contrary to his own wishes and will and according to that of said appellee, Shanks, and thereupon said secretary without any authority whatever from the board of directors of appellant or from the President or manager of appellant, but solely by reason of the said threat of said appellee, Shanks, signed and sealed said alleged waiver which appellant seeks to have voided and canceled by this suit;

That appellant has not at any time authorized the execution of said alleged waiver agreement by said secretary, and has not ratified or confirmed the same in any way.

The facts that the signing of said alleged waiver agreement was procured as a result of the fraudulent and wrongful acts and practices of said appellees, and because of their coercion and duress conclusively appear from the facts that the issuance of said distraint warrant and the exaction of said alleged waiver agreement occurred at a time when the collection of any further income taxes from appellant for the said year, 1918, was absolutely barred by the statute of limitations, and in the bill of complaint, to which reference is hereby made, there are set forth and alleged the various revenue acts of the United States applicable to the collection of taxes for the said year, 1918, from which it conclusively appears that the collection of any further taxes for said year, 1918, was absolutely barred by the statute of limitations. We will not at this point further refer to said internal revenue acts or to the decisions of the courts construing and applying the same, but they will be considered at further length in the argument contained in this brief.

No additional or other assessments or determination of taxes due or claimed to be due under said return for said year, 1918, was ever made. In concluding and summarizing the allegations of appellant's bill of complaint it is the contention of appellant that full and sufficient allegations are contained therein showing that the alleged waiver agreement should be cancelled and annulled, and set aside, for the reasons that it is void and ineffectual upon its face because executed at a time when the collection of any fur-

ther income taxes for the year, 1918, was barred by the statute of limitations, and for the further reasons that the signature of the secretary of appellant to said alleged waiver agreement was procured as a result of the fraudulent and wrongful conduct and duress and intimidation practised upon said secretary by said appellees.

To said bill of complaint, containing the material allegations aforesaid, appellees filed a motion to dismiss upon the alleged ground and for the alleged reason that the United States is an indispensable party defendant to this suit, and that the United States cannot be made a party defendant herein for the reason that it has not consented to be made such party defendant (page 15 Transcript of Record). Afterwards, to wit, on December 26, 1928, the District Court of the United States for the District of Oregon made and entered a decree herein sustaining said motion and dismissing said bill of complaint and providing that the appellees recover their costs and disbursements herein incurred (pages 19-21, Transcript of Record).

It is to reverse said final judgment and decree of December 26, 1928, sustaining the said motion to dismiss the bill of complaint herein, that this appeal is prosecuted, and the merits of this appeal and the decision thereof must be determined entirely from the sufficiency of appellant's bill of complaint, as challenged by appellees' motion to dismiss. No evidence or testimony was received in the cause, and the merits of this appeal must be determined entirely upon the two said pleadings, namely, the said bill of complaint and the said motion to dismiss the same. It is appellant's contention that, under the facts admitted by said motion to dismiss, the United States is not even a proper party defendant to this suit, much less a necessary

and indispensable party thereto, and that this suit should not be dismissed upon the ground contended for by appellees, namely, that the United States government has not been and cannot be made a party defendant herein.

SPECIFICATION OF THE ERRORS RELIED UPON

Appellant at the time of and contemporaneously with its filing of a petition for appeal herein made and filed an assignment of errors, which said assignment of errors is set forth at pages 23 to 26, both inclusive, of the transcript of record herein, reference to which is hereby made. As the greater number of the said assignments of error are predicated upon the opinion of the District Court and upon its reasons for sustaining appellees' motion to dismiss the bill of complaint and are not, therefore, available (Evans v. Suess Ornamental Glass Co., 83 Fed. 709; Stoffregen v. Moore, 271 Fed. 680; Mutual Reserve Fund Life Assn. v. DuBois, 85 Fed. 586) because the opinion of said District Court is no part of the record herein, they will not *in toto* be here repeated, but the principles therein expressed will be noticed and amplified later in the argument contained in this brief. By way of specifying the errors relied upon, appellant states and alleges:

(1) That the United States District Court for the District of Oregon erred in holding and decreeing that the United States is a necessary and indispensable party to this suit and since it cannot be sued that this suit should be dismissed;

(2) That the United States District Court for the

District of Oregon erred in sustaining appellees' motion to dismiss appellant's bill of complaint and in rendering and entering on the 26th day of December, 1928, a final order and judgment and decree in this suit, wherein and whereby it was ordered and adjudged that the bill of complaint herein be dismissed and that appellees recover of and from appellant their costs and disbursements incurred herein; and

(3) That the United States District Court for the District of Oregon erred in not denying appellees' motion to dismiss appellant's bill of complaint and in not holding and decreeing that, from the facts admitted by said motion and apparent on the face of the record, the United States Government had no right or title or interest in or to said waiver or the subject of this suit and was not a necessary or indispensable party thereto.

POINTS AND AUTHORITIES

I.

The contention that the United States is a necessary and indispensable party defendant to this suit might have been raised *by answer* and appellees were not required to raise said point of law by a motion to dismiss the bill of complaint.

Equity Rule 29, page 1125, Montgomery's Manual of Federal Jurisdiction and Procedure (3d Edition).

II.

A motion to dismiss admits all of the well pleaded allegations of the bill of complaint and they stand confessed. It is analogous to a demurrer and like it admits all the facts.

Woodall v. Clark, 254 Fed. 526.
Forbes v. Wilson, 243 Fed. 264.
Destructor Co. v. City of Atlanta, 219 Fed. 996.
Bayley v. Blumberg, 254 Fed. 696.
Painter v. Penn Mut. Ins. Co., 5 Fed. (2d) 1005.
McInnes v. American Surety Co., 12 Fed.(2d)212.
Gilbert v. Fontaine, 22 Fed. (2d) 657.

III.

The government is not liable for, or interested in, the torts or illegal acts of its officers or agents. If the acts be illegal or wrongful, in doing them the agents do not represent the government. They become personally liable to the injured party and proceedings may be brought against them by injunction to prevent a wrongful act or a suit may be brought against them to cancel and set aside their act and its effect, if already done.

39 Cyc. 748.
Hill v. U. S., 149 U. S. 593.
Gibbons v. U. S., 8 Wall. (U. S.) 269.
U. S. v. Cummings, 130 U. S. 452.
U. S. v. Lee, 106 U. S. 196.

IV.

When officers of the government act under invalid authority or exceed or abuse their lawful authority and thereby invade private rights secured by the Constitution, an action to redress injuries caused by the unauthorized act is not a suit against the government. The United States Government is not a necessary or indispensable party defendant to this suit. It being admitted by the motion to dismiss the bill of complaint that the waiver sought to be canceled was procured by the fraud and imposition and duress of appellees this suit may properly be maintained against them without joining the United States Government as a party defendant.

McComb v. U. S. Housing Corporation, 264 Fed. 589.

U. S. v. Lee, 106 U. S. 196.

Philadelphia Co. v. Stimson, 223 U. S. 605.

Tindal v. Wesley, 167 U. S. 204.

Lane v. Watts, 234 U. S. 525.

Payne v. Central Pac. Ry. Co., 255 U. S. 228.

Baker v. Swigart, 196 Fed. 569, opinion by former District Judge Rudkin.

Pennoyer v. McConnaughy, 140 U. S. 1.

Long v. Rasmussen, 281 Fed. 236, opinion by District Judge Borquin.

Wells v. Nickles, 104 U. S. 444.

Head v. Porter, 48 Fed. 481.

Osborn v. Bank, 9 Wheat (U. S.) 738.

Goltra v. Weeks, 271 U. S. 536.

Cunningham v. P. R. Co., 109 U. S. 446.

Poindexter v. Greenhow, 114 U. S. 270.

Chaffin v. Taylor, 114 U. S. 309.

Allen v. R. R. Co., 114 U. S. 311.

McGahey v. Virginia, 135 U. S. 662.

Thornhill Wagon Co. v. Noel, 17 Fed. (2d) 407.

V.

Under the law the appellees are responsible to the United States Government for the collection of income taxes. They have a vital and substantial interest in the outcome of this suit and are concerned in establishing the validity of said alleged waiver to avoid their own personal liability.

Revised Statutes, Secs. 3148, 3182, 3183 and 3187.

Act of February 8, 1875, c 36, Sec. 12, 18 Stat. 309.

VI.

Under the income tax statutes of the United States in effect and governing the collection of appellant's 1918 income taxes and the decisions of the courts thereunder said income tax is barred by the statute of limitations and the said waiver which appellant seeks to cancel by this suit is absolutely null and void upon its face and ineffectual for any purpose.

Bowers v. Lighterage Co., 273 U. S. 346.

U. S. v. Cabot, 5 Am. Fed. Tax Rep. 6172.

Joy Floral Co. v. Commissioner, 29 Fed. (2d) 865.

Russell v. U. S., 278 U. S. 181; 49 Sup. Ct. Rep. 121.

U. S. v. Harry Whyel, 19 Fed. (2d) 260.

Hood Rubber Company v. Thomas White, 28 Fed. (2d) 54.

Rasmussen v. Brownfield Carpet Co., IV U. S. Daily (March 12, 1929) p. 8, decided by U. S. Circuit Court of Appeals for the Ninth Circuit.

ARGUMENT

The three specifications of error relied upon by appellant for a reversal of the final decree rendered herein on December 26, 1928, all relate to the same point and will be considered and argued together. Said specifications of error present the very interesting question as to when and under what circumstances the United States government must be made a party defendant. If, as held by the District Court, the United States is a necessary and indispensable party defendant to this suit, said final decree must be affirmed. But should the court be of opinion that the United States is not a necessary and indispensable party defendant, said final decree should be reversed.

There is, as we view the facts and law of this suit, only one possible ground upon which this court might be justified in affirming the final decree of the District Court, and that is that this court should hold that as a matter of law the said alleged waiver agreement is absolutely void and ineffectual upon its face, and to an affirmance upon said limited and particular ground appellant has no objection, for all it is seeking to accomplish by this suit is to have set aside and canceled and held for naught the said alleged waiver agreement.

As matters now stand, said alleged waiver agreement can be urged by the United States government as a bar to appellant's contention that the statute of limitations has run against the collection of any further taxes for said year 1918, and it is to prevent the use of said alleged waiver agreement as a bar to appellant's contention that the statute of limitations has run against the tax that this suit was filed and this appeal is being prosecuted.

The motion of appellees to dismiss the bill of complaint is based entirely upon the alleged ground that the United States is a necessary and indispensable party defendant, and that therefore this suit cannot be maintained. The District Court in its said final decree took the said view and sustained the said motion to dismiss, based upon said ground, and we shall therefore at the outset of this argument consider the said question as to whether or not under the admitted facts shown by the record the United States is a necessary and indispensable party defendant.

(A) *Appellees' contention that the United States is a necessary and indispensable party defendant might have been raised by answer.*

Under equity rule 29 (p. 1125 Montgomery's Manual of Federal Jurisdiction and Procedure, 3rd Ed.), it is provided among other things that every defense in point of law arising upon the face of the bill, whether for misjoinder, *nonjoinder,* or insufficiency of fact, to constitute a valid cause of action in equity, shall be by motion to dismiss *or in the answer.* In other words, under said rule the contention which appellees make could have been made by answer and a preliminary hearing or trial been had in the District Court with respect to the truth of the allega-

tions contained in the bill of complaint. We call this minor matter of practice to the attention of this court that there may be no hesitancy on its part in declaring that appellees are absolutely bound by the averments of fact contained in appellant's bill of complaint. Having a choice of procedure under said rule appellees have elected to present the said matter of nonjoinder of the United States government by a motion to dismiss the bill of complaint rather than by an answer testing the truth of the averments of the bill of complaint.

(B) *Appellees' motion to dismiss the bill of complaint admits all of the well pleaded allegations thereof, and the same stand confessed.*

It is well settled beyond controversy, and as shown by the authorities cited by appellant under its points and authorities II that a motion to dismiss a bill of complaint in equity admits all of the well pleaded allegations thereof. Such motion is analogous to a demurrer, and like it admits all the facts.

In *Destructor Co. v. City of Atlanta,* 219 Fed. 996, the court said at page 1001:

> "There is a motion to dismiss the bill on various grounds. Of course, a motion to dismiss under the new equity rules must be construed in the same way a demurrer would be, that is, it concedes for the purposes of the motion to dismiss the truth of everything alleged in the bill that is well pleaded."

In *McInnes v. American Surety Co.,* 12 Fed. (2d) 212, the court said at page 215:

> "Upon motion to dismiss the allegations of the bill must be given their full, fair, legal intendment."

In *Gilbert v. Fontaine,* 22 Fed. (2d) 657, the court said at page 659: "The foregoing are the salient facts appearing in the bill. Upon the motion to dismiss, *and upon this appeal,* they must be taken to be true."

(C) *The United States is not a necessary and indispensable party defendant to this suit.*

In view of what we have heretofore said about the manner in which appellees' contention of insufficiency of the bill of complaint for nonjoinder of the United States as a party defendant was raised, namely, by motion to dismiss the bill of complaint rather than by answer, and the legal effect and consequences of such procedure, we enter upon the discussion of whether the United States is a necessary and indispensable party defendant with certain conclusively admitted facts. All of the material facts alleged in appellant's bill of complaint stand confessed upon the record, and this court is bound, in deciding said question, as to whether the United States is a necessary and indispensable party defendant to this suit, to assume that said material allegations are true.

It therefore stands admitted and confessed upon the record in this appeal that the collection of any further income taxes from appellant for the year, 1918, was absolutely barred by the statute of limitations and that the appellee, Huntley, in issuing said distraint warrant and directing said appellee, Shanks, to serve the same upon appellant was acting contrary to law and in violation of his legal rights and duties and in excess of his official authority, and that the procuring and exaction of the signing by the secretary of appellant of said alleged waiver agreement was likewise contrary to law and in violation of appellees' rights and duties and in excess of their official authority, and in violation of the constitutional rights and interests of appellant.

And it also stands admitted and confessed upon the record in this appeal that appellees wrongfully, fraudulently and unlawfully, and by threats and duress and in-

timidation and coercion, impelled and procured said secretary of appellant to execute said alleged waiver agreement. The admitted facts therefore present a situation where not only is the United States not a necessary or indispensable party to the suit, but a situation where, on the contrary, the United States government will refuse to have anything to do with the situation created by the said unlawful and fraudulent and wrongful acts committed by its officers in excess of their rights and duties, and will leave its officials to defend themselves and to atone for and justify their conduct as best they may.

It is well established that no government, either state or federal, can be made legally responsible and liable for the tortious acts of its officers or agents, and it might be well at the threshold of this discussion to call to the attention of this court a few of the many authorities announcing said rule:

In *Vol.* 39 *Cyc.* at page 748, it is said:

> "The government is never deemed guilty of a tort, and is not responsible for the tortious acts of its officers or agents generally, either of malfeasance or of nonfeasance, although apparently committed for its benefit while engaged in the discharge of official duties, and the United States have not by any statute permitted themselves to be sued for the torts of their officers."

In *Hill v. United States,* 149 U. S. 593, the court said at page 598: "The United States cannot be sued in their own courts without their consent, and have never permitted themselves to be sued in any court for torts committed in their name by their officers."

In *Gibbons v. United States,* 75 U. S. 269, the court said at page 274: "But it is not to be disguised that this case is an attempt under the assumption of an implied contract to make the government responsible for the un-

authorized acts of its officers, those acts being in themselves torts. No government has ever held itself liable to individuals for the misfeasance, laches or unauthorized exercise of power by its officers and agents."

In conclusion on this point, we direct this court to the opinion of Mr. Justice Harlan in U. S. v. Cummings, 130 U. S. 452, where it was distinctly held in a case arising out of the unlawful acts of revenue officers of the United States government that the government was not liable for the tortious acts of its said revenue officers, and had a right to interpose as a defense that such revenue officers had transcended the authority conferred upon them by law, and that the government was not liable or responsible therefor.

If from the admitted facts contained in the bill of complaint the action of appellees was unlawful and in excess of their official authority, and was committed under such circumstances as to make their action fraudulent and wrongful and tortious, and if under the admitted facts of the bill of complaint appellees practised coercion and intimidation and duress, and so conducted themselves as that the United States is not legally liable or responsible for their acts, and if, as announced by the authorities just quoted from, an action can never be successfully maintained against any government for the tortious and wrongful and unlawful acts of its officers and agents, then why should it be held that the United States government is a necessary and indispensable party defendant to this suit?

Of what avail would it be to appellant to join the United States as a party defendant? Had such course been pursued, the United States would ultimately and necessarily, under the admitted facts shown by the record, and under the law applicable thereto, been completely

discharged and exonerated. Why should appellant be required, as a matter of law, to join as a party defendant a party against whom he has no cause of action and whom he cannot legally hold responsible? And it being admitted that appellees are the sole parties responsible to appellant, and that they alone are liable and responsible to appellant, why should appellant not be permitted to continue its cause of suit against them?

By sustaining appellees' motion to dismiss the bill of complaint, the District Court from whose final decree this appeal is prosecuted set up an insuperable barrier against the obtaining by appellant of the relief to which it is equitably entitled, and the result of the final decree of the District Court in this suit, in its last analysis, is to hold and declare that wrongful and unlawful acts committed by officers of the federal government, if done under the guise of their apparent or assumed authority, are placed beyond inquiry and redress at the hands of a citizen whose rights and property have been invaded by such officers. There is no good reason, either in morals or in law, which should place any person, even though he be clothed with official authority, from responding in court for his fraudulent and wrongful and unlawful acts.

The principles for which appellant contends have been repeatedly announced in a long line of decisions beginning with the celebrated and leading case of United States v. Lee, 106 U. S. 196, and continuing without waver or deviation down to the present time. It has ever been held that when officers of the government act under invalid authority or exceed or abuse their lawful authority, and by their fraudulent and unwarranted and unlawful acts and conduct invade private rights, secured by the Constitution, an action to redress injuries caused by such unauthorized or

unlawful acts and to obtain relief therefrom is not a suit against the government. We will refer to and quote from a few of the many authorities sustaining appellant's position.

In said celebrated and leading case of United States v. Lee, decided by Mr. Justice Miller, which decision has not only not been reversed or modified, but is still adhered to and quoted from by the courts in subsequent decisions as being the settled law of the land, it was established by the verdict of a jury that the plaintiff had title to the land in controversy and that the United States did not have title, but it was contended that the court could render no judgment in favor of the plaintiff and against the defendants in said action because the latter held the property as officers and agents of the United States and the land was being appropriated to lawful public purposes.

The verdict of the jury in said case of U. S. v. Lee is analogous to the admitted facts of this suit as established by the admissions of the material allegations of appellant's bill of complaint, because in this present suit, just as in U. S. v. Lee, the United States has no property or other right or interest involved—the alleged waiver agreement sought to be voided being admittedly procured and obtained through fraud and wrongful conduct on the part of government officials claiming to act under but exceeding their lawful authority.

Time and space forbid further quotations than the following excerpts from said decision of *U. S. v. Lee,* 106 U. S. 196: At page 208 the court said: "Under our system the people * * * are the sovereign. Their rights, whether collective or individual, are not bound to give way to a sentiment of loyalty to the person of a monarch. The citizen here knows no person, however near to those in power,

or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property there is no reason why deference to any person, natural or artificial, *not even the United States,* should prevent him from using the means which the law gives him for the protection and enforcement of that right."

It was further said by the court at page 219: "The position assumed here is that however clear his rights (referring to plaintiff) no remedy can be afforded to him when it is seen that his opponent is an officer of the United States claiming to act under its authority, for as Mr. Chief Justice Marshall says, to examine whether this authority is rightfully assumed is the exercise of jurisdiction and must lead to the decision of the merits of the question. The objection of the plaintiffs in error necessarily forbids any inquiry into the truth of the assumption that the parties setting up such authority are lawfully possessed of it, for the argument is that the formal suggestion of the existence of such authority forbids any inquiry into the truth of the suggestion." The court then asks the very pertinent question, "But why should not the truth of the suggestion and the lawfulness of the authority be made the subject of judicial investigation?"

In conclusion the court states in said opinion that if the law as contended for by those opposed to the plaintiff is the law of this country, "it sanctions a tyranny which has no existence in the monarchs of Europe nor in any other government which has a just claim to well regulated liberty and the protection of personal rights."

In *Head v. Porter,* reported in 48 Fed. 481, which is also one of the leading cases on the subject under discus-

sion, and which quite thoroughly reviews the authorities, it was held that an officer of the United States in charge of a government armory may be sued in the circuit court for infringement of a patent, notwithstanding that all his acts in relation thereto were performed under the orders of the federal government. In concluding its opinion in said case the court said, at pages 488-9: "If, however, the principle established in the cases we have reviewed * * * are sound, it is difficult to see why the court has not jurisdiction in the present case. This is an action of tort for the infringement of a patent brought against an individual who is an officer or agent of the United States and whose defense is that he acted under orders of the government. That this is no defense in actions of this general character has, as we have seen, been repeatedly held by the supreme court, and the objection interposed that these suits are substantially against the government, and that therefore it is a necessary party to enable the court to grant relief, has been many times urged without avail."

In *McComb v. U. S. Housing Corporation,* 264 Fed. 589, it is stated at page 592, to be a general rule "That when officers of the government act under invalid authority or exceed or abuse their lawful authority and thereby invade private rights secured by the Constitution, an action to redress injuries caused by the unauthorized act is not a suit against the state."

The case of *Philadelphia Co. v. Stimson,* 223 U. S. 605, is peculiarly in point. In that suit the complainant sought to set aside certain harbor lines established by the Secretary of War in the harbor of Pittsburg, Pennsylvania, so far as they encroached upon land owned by the complainant, and in said suit it was further prayed that the Secretary of War be restrained from causing criminal

proceedings to be instituted against the complainant because of the reclamation and occupation of its land outside the prescribed limits.

In said suit it was claimed, as it is upon this appeal, that whatever was done by the Secretary of War was not personal to him but in furtherance of his official duties, and a demurrer to the bill of complaint was filed by the defendant in which it was asserted, among other things, that said proceeding was virtually a suit against the United States and that the United States, not being a party defendant, the suit could not be maintained. The District Court and the Circuit Court of Appeals affirmed the decree, sustaining the demurrer to the bill of complaint, and the matter came before the Supreme Court of the United States, in the face of two decisions sustaining a demurrer to the bill of complaint, asking that the decrees of the lower courts be reversed. In the opinion of the Supreme Court of the United States rendered by Mr. Justice Hughes it was said at pages 619-20:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded (citing authorities), and in case of an injury threatened by his illegal action the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments (citing authorities). And it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred (citing authorities). The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but chal-

lenged his authority to do the things of which complaint was made. *The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.*"

In *Tindal v. Wesley,* 167 U. S. 204, the court asked the following questions in the course of its opinion as shown at page 212:

> "So that the question is directly presented whether an action brought against individuals to recover the possession of land of which they have actual possession and control is to be deemed an action against the state within the meaning of the Constitution, simply because those individuals claim to be in rightful possession as officers or agents of the state and assert title and right of possession in the state. Can the court in such an action decline to inquire whether the plaintiff is, in law, entitled to possession, and whether the individual defendants have any right, in law, to withhold possession? And if the court finds, upon due inquiry, that the plaintiff is entitled to possession, and that the assertion by the defendants of right of possession and title in the state is without legal foundation, may it not, as between the plaintiff and the defendants, adjudge that the plaintiff recover possession?"

The court answered all of said questions in the affirmative, basing its decision upon said case of U. S. v. Lee and subsequent decisions. Speaking of said Lee case the court said at page 281:

> "The essential principles of the Lee case have not been departed from by this court, but have been recognized and enforced in recent cases."

In *Lane v. Watts,* 234 U. S. 525, a demurrer was filed to the bill of complaint to the effect, among other things, that if the legal title to the land involved in said suit had not passed to the plaintiffs as alleged, it was still in the United States which have not consented to the suit, leav-

ing the court without jurisdiction. It was further directly charged in said demurrer that the determination of the suit affects the United States, and they are really indispensable parties in interest and have not consented to be sued. The demurrer was overruled and upon appeal such ruling was sustained, the court saying at page 540:

> "The suit is one to restrain the appellants from an illegal act under color of their office, which will cast a cloud upon the title of appellees. This disposes of the contentions of appellants that this is a suit against the United States or one for recovery of land merely, or that there is a defect of parties, or that the suit is an attempted direct appeal from the decision of the Interior Department, or a trial of a title to land not situated within the jurisdiction of the court wherein an essential party is not present in the forum and is not even suable—the United States."

Payne v. Central Pacific Ry Co., 255 U. S. 228, was a suit to enjoin the Secretary of the Interior and the Commissioner of the General Land Office from canceling a selection of indemnity lands under the Railroad Land Grant. The trial court dismissed the bill of complaint, and the Circuit Court of Appeals, to which the suit was carried, reversed that decree and directed that an injunction should issue. Upon a further appeal to the Supreme Court of the United States the decree of the circuit Court of Appeals was affirmed, the court basing its opinion in part upon said case of Philadelphia Co. v. Stimson, 223 U. S. 605, and stating at page 238 as follows:

> "We are asked to say that this is a suit against the United States and therefore not maintainable without its consent, but we think the suit is one to restrain the appellees from canceling a valid indemnity selection through a mistaken conception of their authority and thereby casting a cloud on the plaintiff's title."

Pennoyer v. McConnaughy, 140 U. S. 1, was a suit in equity by the appellee, a citizen of California, against the appellants, who under the Constitution of Oregon as Governor, Secretary of State and Treasurer of the State, comprised the Board of Land Commissioners of the State, to restrain and enjoin them from selling and conveying a large amount of land in that state to which the appellee asserted title. There was a demurrer to the bill on the alleged ground that the suit was practically against the State and was therefore prohibited by the Eleventh Amendment to the Constitution. The Supreme Court of the United States refused to sustain said contention and held, as shown at page 10 of the opinion, that the suit in question came within one of the well defined and recognized classes of cases wherein a suit might be maintained without joining the government. Speaking to this effect at said page, the court said:

> "The other class is where a suit is brought against defendants who, claiming to act as officers of the state, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the state or for compensation and damages, or in a proper case where the remedy at law is inadquate for an injunction to prevent such wrong and injury, or for a mandamus in a like case to enforce upon the defendant the performance of a plain legal duty purely ministerial—is not within the meaning of the Eleventh Amendment an action against the state."

Long v. Rasmussen, 281 Fed. 236, was decided by Mr. District Judge Bourquin of the District Court of Montana on May 29, 1922. In said suit, which was one in equity against the Collector of Internal Revenue for the

District of Montana, plaintiff alleged that she was the owner of and entitled to the possession of certain property which she claimed had been unlawfully distrained by the defendant, Collector of Internal Revenue, to collect certain revenue taxes assessed against one, Wise, and plaintiff sought to enjoin the threatened sale and to recover possession of the property as being her own.

Just as in the suit involved in this appeal, the United States was not made a party defendant, but the Collector of Internal Revenue being the one who was committing the trespass to plaintiff's right was made the sole and only defendant. It was claimed, just as it is here, that it was a suit in which the United States was a necessary and indispensable party defendant, and that therefore the suit could not be maintained. In disposing of said question adversely to the Collector of Internal Revenue, District Judge Bourquin said at pages 237-8 of the opinion:

> "The suit is not against the United States, but is against an individual who, as an officer of the United States in the discharge of a discretionless ministerial duty, upon plaintiff's property is committing without authority, contrary to his duty, and in violation of the due process of the Constitution, and the revenue laws of the United States, positive acts of trespass for which he is personally liable." (Citing Philadelphia Co. v. Stimson, 223 U. S. 620; Belknap v. Schild, 161 U. S. 18, and Magruder v. Association, 219 Fed. 78.)

In *Wells v. Nickles,* 104 U. S. 444, Mr. Justice Miller, who later wrote the opinion in U. S. v. Lee, supra, said at pages 446-7:

> "That the lumber when first seized by the timber agents was the property of the United States is not denied. It was, therefore, held by them as agents of the government at the time Wells sued not to replevy it, but to enjoin them from selling it and to deter-

> mine his right to it. If, as he maintained, they were seizing and attempting to sell and deliver as public property that which was lawfully his, we know of no principle of law which forbade him to bring them before a legal tribunal. Their authority to act for the government, and the ownership of the property which they asserted a right to seize, were questions, eminently proper to be decided by a court, especially a court of the United States. If it were otherwise, all the property of the citizens of this vast country would be held at the pleasure of anyone bold enough to assert that it is government property and he a government agent."

In *Osborn v. United States Bank,* 22 U. S. 737, which is also one of the celebrated and leading cases dealing with the question herein involved, and decided by no less a distinguished Justice of the Supreme Court of the United States than Mr. Justice Marshall, it was held that where the rights and interests of a state were concerned such state should be made a party defendant if it could be done. It was further held, however, in said case that if the state could not be made a party that was a sufficient reason in and of itself for the omission to do it, and that the court could proceed to a decree against the officers of the state in all respects as if the state were a party to the record.

Goltra v. Weeks, 271 U. S. 536, was a suit in equity to enjoin the seizure of a fleet of towboats and barges by the Secretary of War and Chief Engineer of the United States. The District Court in which the suit was first tried restored the fleet to Goltra and enjoined the defendant officers of the federal government as prayed for, but the Circuit Court of Appeals reversed the action of the District Court on the ground that the United States was a necessary party defendant and could not be sued in such a suit. The opinion of the Supreme Court of the United

States was rendered by Mr. Chief Justice Taft. At page 544 of said opinion the learned Chief Justice says:

> "We cannot agree with the Circuit Court of Appeals that the United States was a necessary party to the bill. The bill was suitably framed to secure the relief from an alleged conspiracy of the defendants without lawful right to take away from the plaintiff the boats of which, by lease or charter, he alleged that he had acquired the lawful possession and enjoyment for a term of five years. He was seeking equitable aid to avoid a threatened trespass upon that property by persons who were government officers. If it was a trespass, then the officers of the government should be restrained whether they professed to be acting for the government or not. Neither they nor the government which they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceeding by a court of competent jurisdiction even though the United States, for whom they may profess to act, is not a party and cannot be made one. By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in an asserted agency for the government. The point is fully covered in Philadelphia Co. v. Stimson, 223 U. S. 605."

The court then proceeds to quote with approval from said case of Philadelphia Co. v. Stimson the exact language therefrom which we have heretofore inserted in this brief.

In *Cunningham v. Macon R. R. Co.,* 109 U. S. 446, still another case decided by Mr. Justice Miller, the court said at page 452:

> "Another class of cases is where an individual is sued in tort for some act injurious to another in regard to person or property, to which his defense is that he has acted under the orders of the government. In these cases he is not sued as or because he is the officer of the government, but as an individual, and

> the court is not ousted of jurisdiction because he *asserts* authority as such officer. To make out his defense he must show that his authority was sufficient in law to protect him." (Citing Mitchell v. Harmony, 13 How. 115; Bates v. Clark, 95 U. S. 204; Meigs v. McClung, 9 Cranch. 11; Wilcox v. Jackson, 13 Pet. 498; Brown v. Hager, 21 How. 305; and Grison v. McDowell, 6 Wall. 363.)

Thornhill Wagon Co. v. Noel, 17 Fed. (2d) 407, is the only reported decision we have found wherein a suit in equity was filed against a United States Income Tax Collector to cancel and set aside an income tax waiver similar to the one involved in this present suit. It was held by District Judge Groner in said suit that the collection of the income tax involved therein was undoubtedly barred by the statute of limitations. Speaking to the point which we are now discussing, namely, whether a United States court has jurisdiction in equity to hear and determine the validity of an alleged income tax waiver, and as to whether the United States is in such a suit a necessary and indispensable party defendant, the court said, as shown at pages 409-10:

> "Under these circumstances this court as a court of equity is perhaps alone clothed with authority to cancel the waiver which in an action at law for a recovery, after complainant has paid the tax, the law court might be wholly without power to reform or cancel. I do not think the United States are a necessary party. Goltra v. Weeks, 271 U. S. 536."

In said suit there was a motion for a temporary injunction and also a motion to dismiss the bill of complaint. The motion to dismiss the bill of complaint was upon the same grounds as those which are asserted by appellees in this suit. The motion for a temporary injunction was denied, but the said motion to dismiss, which presents the question we are here now discussing, was continued for

re-argument. Said case is not further reported, so there is no official record by written opinion as to what final conclusion Judge Groner reached.

We have since the trial of this suit in the District Court written to the attorneys of record for the plaintiff taxpayer in said suit and have received a letter from them in which they state that upon a re-argument on the motion to dismiss the bill of complaint Judge Groner adhered to his previous ruling: that the suit was properly maintainable in equity; that the federal court had jurisdiction; and that the United States was not a necessary party. Said attorneys have further advised that after Judge Groner intimated that he would so hold, the suit was amicably settled to the satisfaction of all concerned, with the result that there is no official record of the precise final ruling made by the court on the point in question.

The principle for which appellant contends on this branch of the case was reiterated in that group of decisions of the Supreme Court of the United States known as the Virginia Coupon cases, viz: *Poindexter v. Greenhow,* 114 U. S. 270, 5 S. Ct. 903; *Chappin v. Taylor,* 144 U. S. 309, 5 S. Ct. 925; *Allen v. R. R. Co.,* 114 U. S. 311, 5 S. Ct. 925; *McGahey v. Virginia,* 135 U. S. 662, 684, 10 S. Ct. 972.

In those cases certain coupons were made legal tender for the payment of governmental taxes. Upon tender of these coupons for the payment of such taxes they were refused by the tax collectors, and the taxes were declared delinquent and distraint proceedings were taken against the taxpayers' property, which, in some cases, was about to be sold to realize the tax, and in other cases the tax was collected on such proceedings in money.

The suits were brought to prevent the carrying out of the distraint proceedings and to recover what money had been collected. The same objection was there made as is made here that the taxes and the property taken to satisfy them were government property and the suits were therefore against the government and could not be maintained.

In the last of the group of cases above cited, viz: McGahey v. Virginia, supra, Mr. Justice Bradley said that any coupon holder who tenders them in payment of his taxes is entitled to be free from molestation as to his property, and if distrained he may (quoting from the opinion)

> "vindicate such right in all lawful modes of redress —*by suit to recover his property,* by suit against the officer to recover damages for taking it, by injunction to prevent such taking."

In these cases what the officers did was for the use and benefit of the government, yet, their acts being unlawful, the government gained no right or interest in the property of the taxpayers.

There is no possible distinction, in principle between, for example, on the one hand, the Lee case, the Virginia Coupon cases and the Stimson case, and, on the other hand, this case. In this case whatever right the government had to the alleged waiver or to the rights or privileges, it was designed to confer, was obtained solely by and through the admitted fraudulent acts of its agents. It being true, as declared by the Supreme Court of the United States, that the government acquired no rights whatever in the property and rights unlawfully procured by its agents for its benefit, by what process of reasoning can it be said that in this case the government does acquire a right by and through the admittedly fraudulently acts of its agents?

The only attempt made in the District Court to dis-

tinguish the cases on which we rely was to say that they are cases where injunction was sought against the agents themselves, as though that changed the principle in any way. There is nothing in that attempted distinction, because whether the suit be to prevent the agent's unlawful act or to undo and annul the act after its accomplishment, the turning point, the gist of the controversy in either case is the government's right to the property or thing involved. As stated in the Lee case, the suit may be maintained although "the judgment must depend upon the right of the United States to the property held by such persons as officers or agents of the United States."

It would, indeed, be a strange and illogical principle that could permit the injured party to restrain a governmental officer from wrongfully seizing his property, and afford him no relief if that officer had so far proceeded as to have actually taken possession of his property. As a matter of common sense the principle must be the same whether injunction is sought to prevent an illegal act, or some other equitable relief is applied for to annul and set aside the effect of such illegal act. The distinction urged by appellees, therefore, that the principle of the Lee case applies only to injunction proceedings and not to proceedings to annul the effect of the fraud or trespass, is illogical and unsound.

In concluding our references to and quotations from authorities sustaining appellant's contention that the United States is not a necessary and indispensable party defendant to this suit, we beg leave to direct the court's attention to the case of Baker v. Swigart, 196 Fed. 569. This was a suit against certain officers of the United States government to restrain acts claimed to be without authority of law and by which complainant was deprived

of rights accorded to him by law. In said suit it was contended that it was in reality a suit against the government. The decision of the court, which was adverse to said contention, was by Mr. District Judge Rudkin, who is at the time of the writing of this brief a member of the United States Circuit Court of Appeals for the Ninth Circuit, to which this brief is addressed. We are gratified to learn that the principles for which we are contending in this branch of our brief in this suit are fully sustained by Judge Rudkin. He, in fact, cites as authorities a number of the cases upon which we rely and to which we have hereinbefore referred, including said leading case of U. S. v. Lee, 106 U. S. 196, which we have hereinbefore stated has never been receded from.

With respect to the claim that the United States government was a necessary and indispensable party defendant, Judge Rudkin said at page 571:

> "The respondents claim that this is in effect a suit against the government. If the position taken by the complainant is sound, and the respondents without authority of law are attempting to deprive him of rights accorded to him by the law, the claim that this is a suit against the government is utterly unfounded. U. S. v. Lee, 106 U. S. 196; Pennoyer v. McConnaughy, 140 U. S. 1; Reagan v. Farmers Loan & Trust Co., 154 U. S. 362; Belknap v. Schild, 161 U. S. 18; Scott v. Donald, 165 U. S. 107."

In view of the admitted facts that appellees acted unlawfully and wrongfully and fraudulently, and practiced duress and intimidation and coercion upon the secretary of appellant, and all of the decisions of the courts to which we have heretofore referred, holding that in such a situation the government is not legally responsible for the unauthorized and unwarranted and illegal acts of its officers, and in view of the unbroken line of authorities, holding

that government officers and agents are in such instances personally liable and responsible and must, by their own efforts, and independent of the support or protection of the government, under whose guise they acted, justify their conduct and relieve themselves from the dilemma in which they find themselves placed by their unlawful and wrongful and tortious conduct and action contrary to and in excess of the authority granted to them by law, we feel confident that this court will not hold that the United States government is a necessary and indispensable party defendant to this suit, because the effect of so holding will be to deny to appellant the right to the relief it is equitably entitled to from appellees.

To say that appellees are immune from having their said wrongful and unlawful acts questioned and relieved against merely because they happen to be clothed with a little brief authority in behalf of the federal government, is a travesty upon and a denial of justice. It should not be said that appellant is debarred of remedy because it has not joined as a defendant a party who is not responsible or legally liable under the law and against whom appellant has no grievance. It is appellant's contention that appellees committed the wrong and that appellant should be relieved of any ill effects or detriment flowing from such wrongful conduct, and appellant confidently believes that this court will not permit the United States government to claim any benefit or advantage derived or accruing from said alleged waiver agreement when the fact is, as is admittedly established by the record in this suit, that said alleged waiver agreement rests upon fraud and the excess of and an unwarranted usurpation of official power and authority.

The District Court from whose final decree this ap-

peal is prosecuted based its final decree very largely, if not entirely, upon the two cases of Minnesota v. Hitchcock, 185 U. S. 373, and Oregon v. Hitchcock, 202 U. S. 62, but said decisions are not in point or applicable here, and are clearly distinguishable from the situation presented by this record in the following particulars:

There is a great difference between a suit to compel a transfer from the United States of property, the title to which is admitted to be vested in the government, and a suit to prevent the transfer by fraud of property, or rights to the government. The two cases relied on by the District Court are of the former class. This case and the decisions on which we rely are of the latter class.

Both of the Hitchcock cases, supra, involved lands of the United States, and the object of one was to cause the conveyance thereof to the State of Minnesota under the School Land Grant. The title to the land was admittedly vested in the government. The object of the other suit was to cause a conveyance of lands of the government to the State of Oregon under the Swamp Land Act, the title being admitted to be vested in the government. It was correctly held that to any proceeding for the divesting of the government of any of its property the government was a necessary party, and that therefore the suits were against the government and could not be maintained.

In this suit, on the other hand, it is admitted that the waiver was procured by the fraud and trespass of the appellees. This is an admission that the government has no right or title thereto and is not interested therein.

In Minnesota v. Hitchcock, supra, Mr. Justice Brewer said:

> "Now the legal title to these lands is in the United States. The officers named as defendants have no

> interest in the lands or the proceeds thereof. The United States is preparing to sell them. This suit seeks to restrain the United States from such sales —to divest the government of its title, and vest it in the state."

In Oregon v. Hitchcock, supra, Mr. Justice Brewer said:

> "Again it must be noticed that the legal title to all these tracts of land is still in the government."

On the other hand, in this suit, the exact reverse of that situation exists. Here the government officers are attempting to take from appellant by fraud that which is admittedly the property and right of appellant, and vest it in the government. The government has always refused to be a party to such frauds and refuses to recognize or acknowledge the agency of its officers when so unlawfully acting.

The District Court, from whose final decree this appeal is prosecuted, labored under the misapprehension that this suit involved the right or title to government property of the United States, but as we have heretofore shown and pointed out the alleged waiver agreement which appellant seeks to have canceled and set aside is not in fact property at all—it is a nullity. It is void upon its face, and it is ineffectual not only because it was procured by fraud and duress and unlawful conduct on the part of appellees, but because it was exacted at a time when the collection of any further taxes for the year 1918 had expired and the tax debt itself had been extinguished by the statute of limitations. The statute of limitations for the collection of any further taxes from appellant for said year 1918 expired on May 9, 1924, and the tax debt was then extinguished, and therefore the said alleged waiver agreement is void upon its face. It cannot be said to be

property, much less can it be said to be property belonging to the United States government, because it was obtained under such admitted circumstances as that the United States government cannot be heard to sanction its execution or claim any benefit or advantage from it.

Analogous to the said reasoning and conclusion of the District Court was its assertion in rendering its decree herein that it must be assumed that said alleged waiver agreement has a face value, and that such face value belonged to the United States government. The District Court, and in fact no court, has a right to assume anything contrary to the established facts, and, as we have hereinbefore pointed out, the material allegations of the bill of complaint show that said alleged waiver agreement is utterly void and of no value whatsoever, and the motion to dismiss the bill of complaint admits, as would a demurrer, all of the material allegations of the bill of complaint, and to say, therefore, that the alleged waiver agreement has a face value, when it is conclusively established by the record that it has no value at all, and to say or to hold that it has a value belonging to the United States government is to do violence to all rules of pleading and well established law.

In concluding our argument on this branch of this appeal we will refer to one other matter which seems to have actuated the District Court in arriving at its final decree herein, and that is the said court's unwarranted conclusion that the United States government was the only person who could possibly have any interest in this suit, and that whatever the appellees did was done in their official capacity and for the benefit of the federal government, solely, and not in anywise to exculpate or benefit themselves.

As we have heretofore pointed out and shown from

authorities, it is never an excuse or justification for a government officer or agent that he acted in behalf of his principal, the government, if the facts are that he exceeded his powers and violated and went beyond the authority vested in him, and where such accusation is made against him he must justify and prove that he acted within his authority.

In this connection we further call the court's attention to the fact that the appellees herein have a very vital and substantial and pecuniary interest in the outcome of this suit, because under the statutes of the United States, to-wit: Sections 3148, 3182, 3183 and 3187 of the Revised Statutes and the Act of February 8, 1875, c 36, Section 12, 18 Stat. 309, they are personally liable and responsible to the government for the collection of income taxes accruing within their district, and they must collect the said taxes efficiently and punctually, and should they fail and neglect so to do they are liable to the United States for their omission.

It was because appellees had a very vital interest in the collection of said income taxes that they exacted and procured from the secretary of appellant the said alleged waiver agreement, because at the time they wrongfully and unlawfully procured the same the statute of limitations had already run against the collection of any further taxes from appellant for said year, 1918, and having allowed the statute of limitations to run against said tax appellees were vitally interested in obtaining, if possible, some paper whereby they could, if possible, restore and revive the collection of further taxes, and not only were they not disinterested, but they were exceedingly and vitally and financially interested in exculpating themselves from their own laches and negligence in failing to collect

for the United States further taxes, if such, if any, were due.

There can be no question upon the admitted facts disclosed by the record that the United States is not a necessary or an indispensable party defendant to this suit and that the sustaining of appellees' motion to dismiss appellant's bill of complaint upon that ground was unwarranted and unjustified.

(D) *The alleged waiver agreement of date September 26, 1925, is void and ineffectual and a nullity upon its face.*

In appellant's bill of complaint it is alleged that at the time of the wrongful issuance and service of said distraint warrant upon appellant and the obtaining of the signing of said alleged waiver agreement dated September 26, 1925—being the waiver agreement appellant seeks to have canceled—the collection of any balance of taxes assessed for said year, 1918, or any further taxes for said year was barred by the statute of limitations. Said allegations were made in inducement of and to accentuate and establish, beyond question, the further allegations of said bill of complaint that fraud and duress were practiced in procuring the execution of said alleged waiver agreement and to negative any suggestion or contention that the United States government has any property right or interest in said alleged waiver agreement and said allegations, if true, show that said alleged waiver agreement is void and a nullity upon its face and should for that reason alone, be canceled.

Said alleged waiver agreement was fraudulently procured by appellees from appellant's secretary by duress and coercion in the vain hope that it would revive and vitalize

and permit the collection of income taxes already dead and long outlawed and barred by the statute of limitations. Said alleged waiver agreement attempted—at a time when collection was already barred—to permit assessment and collection up to December 31, 1926.

At the time of its execution—September 26, 1925—the admitted situation with respect to the income taxes of appellant for the year 1918—the subject matter of said waiver—was as follows: an income tax return had been duly filed by appellant on May 9, 1919, and taxes had been assessed thereon first, by an original assessment, dated July 24, 1919, and later by an additional assessment, made February 8, 1924, both assessments being made within five years from the date of the filing of the return. No additional or other assessments or determination of taxes due or claimed to be due under said return for 1918 were ever made.

Whether or not by consent or agreement between the commissioner and the taxpayer the right, on the part of the commissioner, to make and collect other additional assessments was preserved is wholly immaterial. The subject matter of the waiver in question, being the alleged waiver of date September 26, 1925, is the assessments made, as before stated, within five years of the filing of the said income tax return.

The revenue acts of the United States applicable to the collection of income taxes for said year 1918, under said return filed on May 9, 1919, are the revenue act of 1918, c. 18, 40 Stat. 1057, 1083; the revenue act of 1921, c. 136, tit. 11, "Income Tax", 42 Stat. 227, 265, and the revenue act of 1924, passed June 2, 1924, c. 234, tit. 11, 43 Stat. 253, 299, 300, 301, 303 and 352, all of which said revenue acts are referred to and construed in the case of Russell

v. United States, 49 Sup. Ct. Rep. 121, hereinafter referred to.

Under said revenue acts the period of time within which said assessments already made on said return for 1918 or within which any further income taxes for said year could be legally collected expired on May 9, 1924, or five years after the said filing on May 9, 1919, of the income tax return for said year. So as matters stood on September 26, 1925, the date when the alleged waiver agreement, which appellant seeks to have canceled, was executed, any right of the United States to collect on said assessments already made or to collect on any further assessment for said year 1918, was completely barred and at an end.

It is a well established principle of law that where a liability is created by a special statute and in the said special statute, creating such liability, a time is fixed within which such liability may be asserted and enforced, that such assertion and enforcement of liability must be effected within the precise time limited and prescribed by the statute, otherwise the provisions of the statute not only bar the remedy but also entirely extinguish the liability. In re Harrisburg, 119 U. S. 199, 214 and Danzer v. Gulf R. R. Co., 268 U. S. 633. And this declaration of already existing law was expressly written into the revenue act of 1926, in section 1106 (a) thereof. See revenue act of 1926, Act Feb. 26, 1926, C. 27, Sec. 1, 44 Stat. 9.

The first case, construing the revenue acts here involved to which we direct the Court's attention is *U. S. v. Cabot, decided June 15, 1926, and reported in 5 Am. Fed. Tax Rep. 6172.* That was a suit brought by the United States to collect from defendant alleged unpaid balances

of income taxes for the year 1919. It there appeared that although the suit was brought about three years and five months after the assessment was made *it was not brought until after more than five years had expired from the date of the filing of the return for said year.* The court held that further collection was absolutely barred by the statute of limitations.

It was contended by the government that by virtue of the revenue act of 1924 it had six years from the date of the assessment within which to collect the tax but the court held, and properly so, that the revenue act of 1924, enacted on June 2, 1924, had no retroactive effect and that as five years and seven months and eighteen days had elapsed between the time when the assessment was made and the suit was filed, the statute of limitations had run and that no added time was given by said revenue act of June 2, 1924.

In *U. S. v. Whyel,* 19 Fed. (2d) 260, said Cabot case was referred to and approved and it was held in conformity to the ruling in said Cabot case that an assessment made prior to the passage of the said revenue act of 1924 was in no way affected or governed thereby. At page 264 the Court said: "In the case before us the return and assessment were made prior to the passage of the act of 1924, and, although made within the statutory period of five years, no action was begun for nearly one year later —many months beyond the five year limitation. For this reason, plaintiff's action cannot be maintained, because of the bar of the statute."

Prior to the decisions of the lower courts in the case of Bowers v. Albany Lighterage Co. the internal revenue department of the United States apparently labored un-

der the misapprehension that it was *proceedings in Court,* only, that must be begun within five years from the date of the filing of the income tax return and that if the assessment was duly made within the five year period, collection, by distraint, could be effected at any time later. It was undoubtedly this erroneous conclusion and view of the law which caused appellees herein to permit the collection from appellant of any further income taxes for said year 1918, if aught were due, to become barred by the statute of limitations and when they suddenly discovered that collection even by distraint might be barred they unlawfully and fraudulently procured the execution of the alleged waiver agreement which appellant seeks to have canceled.

The decisions of the lower courts in said Bowers case were affirmed by the Supreme Court of the United States on February 21, 1927. The decision is reported in 273 U. S. 346; 47 Sup. Ct. Rep. 389. In its said decision the Supreme Court of the United States held that the collection of income taxes for the years 1916 and 1917 was barred by the statute of limitations because proceedings were not begun within five years from the date of the filing of the income tax returns for said years and the Court expressly held, and this was the particular point of the case, that the expression, "proceedings", in the revenue statute refers to and comprehends not only actions or suits in Court but distraint, as well, and that both court action or suit and distraint must be had within five years from the date of the filing of the income tax return.

The revenue acts governing the collection of income taxes for the year 1918, insofar as the same relate to the period of limitations are the same as those governing the

collection of income taxes for the years 1916 and 1917, so that, said Bowers case is an unquestionable authority for the legal proposition that the collection, either by court proceedings or distraint, of income taxes for the year 1918 must be begun within five years from the date of the filing of the income tax return, otherwise collection is barred and extinguished by the statute of limitations.

On September 25, 1925, when the distraint warrant was issued and served, and on September 26, 1925, when the alleged waived agreement involved in this suit was executed, the collection of the said original tax and of the said additional tax, which was the subject matter of said warrant and waiver, had been and were barred and extinguished by the limitations prescribed by the existing revenue acts. The alleged waiver was therefore void and ineffectual and the United States government acquired no property or other rights or interests therein or thereunder.

Said alleged waiver agreement is not the consent agreement authorized by section 278 (c) of the said revenue act of 1924 but instead is an attempt to cure the department's error as to assessments already made. The waiver authorized by the various revenue acts is the mutual consent of the Commissioner and taxpayer that an assessment may be made and collected after the expiration of the limitation period. But no revenue act has ever authorized the waiver by the taxpayer of the benefit of the bar of the statute of limitations *after* the limitation period has fully expired. And that is what the alleged waiver involved herein purports to do. It was obtained to relieve the Collector of his personal liability for failing to collect the tax in time. The alleged waiver and its effects were and are, therefore, personal to the appellees.

Under date of January 22, 1924, appellant signed the

income and profits tax waiver which is set forth at pages 7 and 8 of the transcript of record. Said waiver provides for additional time within which assessments might be made with respect to said 1918 income taxes of appellant and purports to extend beyond the statutory period of limitation the time within which assessments of taxes for said year might be made, but, in no event, beyond March 15, 1925. Nothing appears to have been done under said waiver. It was not essential to the said additional assessment of date February 8, 1924, because that assessment was made within five years from the date of the filing of the income tax return and did not depend for its validity upon said last mentioned waiver agreement.

Nothing is said in said last mentioned waiver agreement about any extension of time within which to effect collection. It appears to relate to *assessments* of taxes, only. But should it be contended and the contention be sustained that said last mentioned waiver agreement extends, also, the time of collection it does not, in any event, extend such time of collection beyond the time limit definitely and specifically fixed therein, to-wit: March 15, 1925, and, as heretofore explained and set out, it was not until more than six months after said March 15, 1925, or until September 25 and 26, 1925, that said distraint was issued and the waiver agreement, sought to be avoided, exacted.

So that whether you take the time limit for collection as being five years from the date of the filing of the income tax return—or five years from May 9, 1919, which would be May 9, 1924—or whether you take the time limit to be March 15, 1925, in either event the taxes for 1918 were barred and extinguished. The distraint was made neither within five years from the date of the filing of the

return nor within the time specified in said waiver agreement dated January 22, 1924.

A case squarely in point on this subject is that of *Hood Rubber Co. v. White,* 28 Fed. (2d) 54. In that case, which involved income taxes for the years 1918 and 1919, a waiver was signed by the taxpayer allowing the government an additional one year or six years in all to assess and collect the taxes. The completed return was filed on July 14, 1919, and it was not until December 15, 1926, or more than six years thereafter that distraint was issued and the taxes collected. The government contended that it was not limited to the precise time specified in the waiver but that it could take advantage of the six year period of collection provided for in the later revenue act of 1924.

In ruling adversely to the government's said contention and in holding that the time for collection of the taxes was entirely governed by the terms of the waiver the court said at page 55:

> "The government's contention that the waiver did not limit the time of collection of the tax to six years is unsound. The government takes advantage of the six year period for assessment, and then says that the six year period for collection was changed by the later statute of 1924 (26 U. S. C. A., Sec. 1061), which allowed six years after a valid assessment for collection. The government cannot have its cake and eat it too. Either the waiver conferred no power on the government to make the assessment later than the statutory period allowed, or it set up a six year restriction on collection as well as assessment. It is distinctly unfair for the government to take advantage of one part of the waiver and refuse to be bound by the other part of it."

Although at the time this suit was instituted, to-wit: on December 28, 1927, it was a doubtful or mooted ques-

tion whether a waiver of the statute of limitations prescribed by the internal revenue acts, made at a time when the prescribed limitation had already expired, was valid or effectual or not it has, since the filing of this suit, been judicially declared, in accordance with appellant's contentions, that a waiver so obtained is absolutely void and ineffectual for any purpose whatever and said mooted question has forever been put at rest. We refer to the three cases of *Joy Floral Co. v. Commissioner of Internal Revenue,* 29 Fed. (2d) 865, decided December 3, 1928; *Russell v. United States,* 278 U. S. 181; 49 Sup. Ct. Rep. 121, decided by the Supreme Court of the United States on January 2, 1929, and *Rasmussen v. Brownfield Carpet Company,* Vol. IV. No. 8—U. S. Daily—issue of March 12, 1929, page 8, decided by the United States Circuit Court of Appeals for the Ninth Circuit on February 11, 1929. We will refer briefly to each of said decisions, all holding squarely and unequivocally that an alleged waiver agreement such as appellant seeks to have set aside by this suit is void and ineffectual and a nullity.

In *Joy Floral Co. v. Commissioner,* 29 Fed. (2d) 865, involving, as here, income taxes accruing under the revenue act of 1918, the taxpayer's return was filed on October 15, 1919, and a deficiency assessment made July 15, 1925—more than five years later. The taxpayer contended that the Commissioner possessed no lawful authority to make the assessment after the lapse of five years from the filing of the return and that the assessment was therefore illegal. It was disclosed that the commissioner and the taxpayer consented in writing that the commissoner might make an assessment upon the return notwithstanding the lapse of the five year period but just as in the present suit it further appeared that the writing was

not executed *until after the lapse of the five year limitation.*

The Board of Tax Appeals held that the consent was valid and effective and sustained the assessment but the Court of Appeals of the District of Columbia reversed this ruling and held that such consent or waiver agreement to be valid must be made *prior* to the expiration of the statute of limitations, saying, among other things, at page 867: "It is unreasonable to believe that Congress felt it necessary to provide a remedy whereby taxpayers may restore to the commissioner the right to assess income taxes upon their returns *after* the statute of limitations has deprived the commissioner of authority to make any assessment thereon."

Russell v. United States, 278 U. S. 181; 49 Sup. Ct. Rep. 121, involved, as does this appeal, an income tax assessment for the year 1918. The salient dates were: income tax return filed June 12, 1919; assessment made in March, 1924, but suit was not filed to collect tax until January 23, 1925—more than five years after the filing of the return. All of the internal revenue acts bearing upon the collection of income taxes for said year, 1918, are referred to and construed in the decision in said case. The Court held that the time within which a suit might have been brought to collect any additional taxes for said year, 1918, expired on June 12, 1924—five years after the return date.

It was contended by the government that the internal revenue act of 1924 extended the time within which suit might be brought to March, 1930—six years after the assessment. It appeared, however, that the assessment had been made *prior* to the passage of the act of 1924 and it was held that said act had no retroactive effect and did not

extend the time for collection beyond the period limited by the former internal revenue acts.

The situation presented by said Russell case and this suit are in all respects identical. Both cases relate to income taxes for the year, 1918, and in both cases the assessments of taxes for said year were made and the collection of the tax thereon accrued *prior* to the date of the passage of said act of 1924, which was on June 2, 1924. Said Russell case is a square holding to the effect that the collection of income taxes for the year, 1918, is, irrespective of any provisions of any subsequent internal revenue acts, absolutely barred and extinguished five years after the date when the income tax for such year is filed.

Applying said decision of the United States Supreme Court in said case of Russell v. United States, 278 U. S. 181; 49 Sup. Ct. Rep. 121 to the suit at bar, we find that the collection from appellant of any further income taxes for said year, 1918, was long previous to September 26, 1925, absolutely barred and extinguished by the statute of limitations and it, therefore, follows that said alleged waiver agreement of date September 26, 1925, was void upon its face and ineffectual for any purpose.

At the time said alleged waiver agreement was signed the collection of any further income taxes for the year, 1918, was already barred by the statute of limitations. The return had been filed on May 9, 1919, and two assessments had been made thereon, both ante-dating the passage of the revenue act of 1924. Although on January 22, 1924, a waiver agreement was signed extending the time to file additional assessments to March 15, 1925, nothing was done thereunder. The distraint and waiver, which forms the basis and subject matter of this suit, were not issued or executed until September 25 and 26, re-

spectively, 1925, which was not within five years from the date of the filing by appellant of its income tax return for said year, 1918, and was long subsequent to said extension date of March 15, 1925.

As the assessments were made previous to the date of the passage of the internal revenue act of 1924 and as held in said Russell case said act has no retroactive effect, the collection from appellant of any further income taxes, if due, for said year, 1918, was absolutely barred and extinguished five years from the date of the filing of its income tax return for said year or on May 9, 1924, rendering said alleged income tax waiver of date September 26, 1925, void upon its face.

We are pleased to be able to refer to and quote from a recent decision to the same effect as the said Russell case. It was decided by the United States Circuit Court of Appeals for the Ninth Circuit—the very Court to which this brief is addressed. We refer to the case of Rasmussen v. Brownfield Carpet Company, reported, at the time of the preparation of this brief, in Volume IV U. S. Daily, No. 8, issue of March 12, 1929, at page 8. The decision was by Mr. Circuit Judge Gilbert, specially concurred in by Judges Rudkin and Dietrich.

It was held in said case that the taxpayer was entitled to recover from the Internal Revenue Collector against whom the proceeding was brought, certain income taxes previously paid under protest, the basis of the ruling being that the distraint proceedings were barred by the statute of limitations and the collection of the taxes illegal.

It appears from the opinion that two income tax returns were filed for the year ending January 31, 1919, a tentative return on March 15, 1919, and a complete return on June 16, 1919. The warrant of distraint was is-

sued six years and one day after the first return was filed and five years and nine months after the second return was filed. It was held in the main opinion that the collection of the income tax in question was barred by the statute of limitations five years after the date of the filing of the original return and that as the assessment had been made prior to the passage of the internal revenue act of 1924, the provisions of the latter did not apply or extend the period of limitation.

In concurring specially Judges Rudkin and Dietrich expressed no opinion upon the question whether the statute of limitations began to run upon the filing of the tentative return of March 15, 1919, but were emphatic to the effect that the said decision of Russell v. United States, supra, was controlling, saying:

> "If it be assumed that the period of limitations commenced to run on June 16, 1919, the date of the filing of the complete return, under the rule of Russell v. United States (Dec. Supreme Court, January 2, 1929) (III U. S. Daily 2706) distraint proceedings were barred and the collection of the tax was illegal."

Most of the decisions to which we have referred in the development of our argument that the alleged waiver agreement, sought to be canceled, is void upon its face, have been rendered *since* the institution of this suit, the same having been commenced at a time when said matter was not entirely free from doubt. If this court should be of opinion, based upon said decisions, that the alleged waiver agreement of September 26, 1925, is null and void and of no effect on its face because it was executed at a time when the statute of limitations had not only barred the remedy but also extinguished the liability, it may lead to an affirmance, on that ground, of the decree appealed

from, because it may be contended that, inasmuch as said alleged waiver is void on its face, a resort to equity to set it aside is unnecessary.

But, as stated at the beginning of this argument, appellant would be willing to acquiesce in an affirmance of the decree appealed from, *provided,* it is based upon the ground that said alleged waiver is void on its face and this Court so declares. Appellant commenced this suit and is prosecuting this appeal with a view to thereby removing said alleged waiver which stands as an impediment to appellant's just and well-founded claim and contention that the said income tax assessments are barred and extinguished by the statute of limitations.

Appellant seeks a judicial determination—in some form—decreeing and stating that said alleged waiver is ineffectual and it is immaterial to appellant whether the decree appealed from be affirmed or reversed, provided, it is judicially declared and stated that said alleged waiver is void and of no effect. Should this Court entertain the view that said alleged waiver is void upon its face and that hence this suit is unnecessary, we earnestly ask that in the opinion rendered this reason be fully expressed.

CONCLUSION

In conclusion and by way of a brief summary of the position of appellant, which finds itself confronted with an alleged waiver as an effectual means of removing the bar of the statute of limitations and of compelling it to pay, by way of asserted additional income taxes and interest and penalties, large sums of money, which it has always justly felt and contended were and are not due or

owing from it but being wrongfully demanded and exacted, appellant contends:

That as the motion to dismiss the bill of complaint conclusively admits that the alleged waiver was obtained by fraud and duress and under such circumstances as make appellees' procurement of it illegal and unauthorized, the United States is not a necessary or indispensable party to this suit; that the alleged waiver is null and void and ineffectual upon its face because procured at a time when the statute of limitations had already run and the collection of further taxes for the year, 1918, was barred and extinguished and that the final decree of the District Court dismissing the bill of complaint for non-joinder of the United States as a party defendant should be reversed unless an affirmance be ordered upon the ground that said alleged waiver is void upon its face, rendering the prosecution of this suit unnecessary.

Respectfully submitted,

.....

D. J. MALARKEY,

.....

E. B. SEABROOK,

.....

A. M. DIBBLE,

MALARKEY & DIBBLE,

Attorneys and Solicitors for Appellant.

STATE OF OREGON, ss.

County of Multnomah

I, A.M.Dibble, one of the attorneys and solicitors for appellant, do hereby certify that I have prepared the within and foregoing copy of Appellant's Brief in the within and foregoing cause and have carefully compared the same with the original thereof; that it is a correct transcript therefrom and of the whole thereof.

Portland, Oregon, dated the 29th day of April, 1929.

A M Dibble

Of Attorneys and Solicitors for Appellant.

No. 5744

In the United States Circuit Court of Appeals

For the Ninth Circuit

ELECTRIC STEEL FOUNDRY,
a Corporation,

Appellant,

vs.

CLYDE G. HUNTLEY, as Collector of United States Internal Revenue for the District of Oregon, and W. S. SHANKS, as Deputy Collector of United States Internal Revenue for the District of Oregon,

Appellees.

Upon Appeal from the United States District Court for the District of Oregon.

Brief for Appellees

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I.

THE CASE

This case is before the court on appeal from the decree entered in the District Court of the United States for the District of Oregon, said decree having been entered on appellees' motion to dismiss the bill (Tr. p. 15) on the ground that the United States is an indispensable party to the action and can not be made a party because it has not given its consent to be made such, and, therefore, the action can not be maintained (Tr. p. 20).

The bill was filed by the Electric Steel Foundry, a corporation, appellant (complainant below), against Clyde G. Huntley, as Collector of United States Internal Revenue for the District of Oregon, and W. S. Shanks, as Deputy Collector of United States Internal Revenue for the District of Oregon, appellees (defendants below), the sole relief sought in said action being to cancel, set aside and annul a written document called an income and profits tax waiver (Tr. p. 5-6) given by appellant on the 26th day of September, 1925, which said waiver extended the period of limitations upon which distraint or proceedings in court might be begun for the collection of taxes assessed against appellant by the Commissioner of Internal Revenue for the year 1918, and which said waiver remained in effect until December 31, 1926.

The appellees filed a motion for an order dismissing the bill on the ground and for the reason that the United States is an indispensable party and can not be made a party for the reason that it has not consented to be made such, and by reason thereof the action can not be maintained. The matter came on before the court for hearing, and appellees' motion was sustained (Tr. p. 17).

Thereafter, a petition for rehearing of said motion was filed by the appellant, which was denied (Tr. p. 19).

Thereafter, the cause came on regularly for hearing before the court on the motion of appellees for an order dismissing the bill on the ground and for the reason that the United States is an indispensable party, and the court ordered and adjudged, and a decree was therein entered dismissing the bill with costs to the appellees assessed in the sum of $10.00 (Tr. p. 20-21).

From the decree so entered this appeal is prosecuted.

II.

STATEMENT OF FACTS

The material allegations of the bill are:

That on September 26, 1925, the appellees, acting in their official capacity, secured from the appellant an income and profits tax waiver (Tr. p.

5-6). In paragraph 3 of the bill (Tr. p. 6) it is alleged that on May 9, 1919, the plaintiff filed with the Collector of Internal Revenue for the District of Oregon its return on income taxes for the year 1918, showing a tax liability due the United States of $345,095.39, which amount was duly assessed July 24, 1919; and that complainant paid the sum of $217,592.11, leaving an unpaid balance of $125,-503.28. Appellant filed a claim for abatement of said balance, and on December 8, 1924, $24,970.08 was abated by the Commissioner of Internal Revenue. No other assessment or determination was made until February 8, 1924, when the Commissioner assessed an additional tax of $51,556.79. On September 25, 1925, Collector Huntley issued to Deputy Collector W. S. Shanks a distraint warrant (Tr. p. 13), commanding Shanks to collect the balance of the tax due and owing by the complainant for 1918 in the sum of $127,503.28, with interest in the sum of $44,607.07, making a total of $172,-110.35, and further commanding said Shanks to distrain on the property of the appellant (Tr. p. 8-9). On September 26, 1925, Shanks served said distraint warrant upon complainant by handing the same to the complainant's Secretary, and at the time Shanks demanded of complainant's Secretary the sum of $172,110.35, and threatened to distrain, or as an alternative that complainant execute a

waiver, whereupon complainant's Secretary executed said waiver (Tr. p. 9).

The complainant further charges in the bill that the waiver (Tr. p. 5-6) was executed under fraud and duress; further alleging that said Secretary who executed the waiver had no authority from complainant to execute the same; and further alleging that the acts of said Secretary have never been confirmed by the complainant.

III.

ISSUE

Is the United States an indispensable party, and, not having consented to be made a party, can the action be maintained?

IV.

ASSIGNMENT OF ERRORS

Appellant has set up nine (9) assignment of errors (Tr. p. 23-26) all of which go to the sole question that the court below erred in holding and decreeing the United States as a necessary and indispensable party, and, since it can not be sued, the action should be dismissed.

For the purpose of argument all nine (9) assignments of errors will be considered together.

V.

POINTS AND AUTHORITIES

I.

All parties to a contract are indispensable parties to a bill in equity for its revision or cancellation.

Shields vs. Barrow, 17 Howard 130;
United States vs. N. P. Railway, 67 C. C. A., 269;
21 Corpus Juris, 282 (Citing Cases).

II.

Where persons required to be made parties by general rules of equity pleading are omitted, and the defect appears on the face of the bill, the proper method of interposing objection is by demurrer. A court can not make a decree in the absence of a party whose rights must necessarily be affected thereby.

Carey vs. Brown, 92 U. S. 171;
Coiron vs. Millaudon, 19 Howard 115;
Gregory vs. Stetson, 135 U. S. 579;
Waterman vs. Canal-Louisiana Bank, 215 U. S. 33.

III.

The United States is the real party in interest in this suit, the collector has no pecuniary interest in the suit. A cancellation of the waiver would

not affect the collector but such judgment and decree would destroy property of the United States.

Minnesota vs. Hitchcock, 185 U. S. 373;
Oregon vs. Hitchcock, 202 U. S. 62;
Wells vs. Roper, 246 U. S. 337;
Louisiana vs. Garfield, 211 U. S. 70;
United States ex rel Goldberg vs. Daniels, 231 U. S. 218;
Louisiana vs. McAdoo, 234 U. S. 627;
Maryland Casualty Co. vs. Jones, Collector, 24 Fed. (2d) 836.

IV.

If the threatened distraint to collect the tax were barred by limitations under the statute, the same could only be heard and considered after the tax had been paid.

The collector is required to collect the tax, and by restraint if necessary. It is for the court to determine whether or not the statute of limitations had run, and this question can not be raised until the tax is paid.

Section 3224, Revised Statutes;
Graham vs. DuPont, 262 U. S. 234;
Bailey vs. George, 259 U. S. 16;
Dodge vs. Osborn, 240 U. S. 118;
Ellay Company vs. Bowers, 25 Fed. (2d) 634.

VI.

ARGUMENT

For the purpose of this argument it is not deemed proper or necessary to discuss whether the waiver, the subject of this appeal, was obtained by duress or fraud as alleged in the bill, or whether the waiver on its face is sufficient to enable the Government to collect at this time taxes assessed against the appellant for the year 1918. On the latter proposition it is sufficient to say for the purposes of this appeal that the waiver must be treated as having a face value sufficient to deprive the appellant of its rights, for otherwise the appellant would not be entitled to maintain an action in equity to set aside such waiver on account of its having been obtained through fraud or duress. In other words, if the waiver did not have a face value there would be no necessity for setting it aside on account of the manner in which it was obtained, as the appellant would have an adequate remedy at law, and, would, therefore, not be able to invoke the aid of a court of equity. If, then, the document which the appellant seeks to have annulled has a face value it constitutes property, and the question immediately arises to determine whose property it is and to whom it is of value. It will hardly be contended that the waiver is the property of anyone else than the

United States of America. It was obtained by the defendants in their capacities as Collector and Deputy Collector of Internal Revenue of the United States, not for their personal benefit, but for the **benefit of the United States of America.** If the waiver should be cancelled, its cancellation would result in no personal loss to either of the defendants, but would affect only the United States. By its language it was given in order to enable the United States through the Bureau of Internal Revenue to give thorough consideration to the taxpayer's claim, and it consents to a longer time than would otherwise be allowed for a distraint in the name of the United States or a proceeding in court in which the United States would appear as plaintiff, to be instituted. It is in no wise personal property of either or both of the individual appellees, but is the property of the United States and now a part of the official records and files of the Treasury Department of the United States. If the two appellees were to go out of office the status or ownership of the waiver would be in no wise changed, but would remain as a part of the official records owned and possessed by the United States.

Since, then, the waiver must be treated for the purposes of this action as having a face value, and since that value inures only to the United

States, and since the waiver is the property of the United States, the question arises whether this action can be maintained without the United States being made a party. The action is not brought to restrain an official from doing some unlawful act. It is brought to cancel, set aside and annul a written document, the property of the United States. If this were an action between private parties in which the Government's rights were not involved, it is elementary that the owner of the property would be a necessary and indispensable party to the action. All the parties to a contract are ordinarily indispensable parties to a bill in equity for its recision and cancellation.

Shields v. Barrow, 17 Howard 130;
U. S. v. N. P. Railway, 67 C. C. A. 269;
21 Corpus Juris, 282 (Citing cases).

Where persons required to be made parties by general rules of equity pleading are omitted and the defect appears on the face of the bill, the proper method of interposing objection is by demurrer from one of the parties. Carey v. Brown, 92 U. S. 171.

A court can not make a decree in the absence of a party whose rights must necessarily be affected thereby.

Coiron v. Millaudon, 19 Howard 115;
Gregory v. Stetson, 133 U. S. 579.

When a necessary and indispensable party can not be brought before the court, the court can not proceed but must dismiss the bill. Waterman v. Canal-Louisiana Bank, 215 U. S. 33.

Going further, it would appear that if this was a case in which property had been procured for a private party by a private agent it would not be necessary to join the agent as a defendant. Donovan v. Campion, 85 Fed. 72. In the Donovan case, supra, it was held that an agent employed to procure title to realty and convey it to his principal is not an indispensable party to a suit to set aside the deed for fraud.

The United States Supreme Court for the purpose of equity actions has divided parties to a suit into three classes, viz: nominal, necessary, or indispensable parties. In the leading case of **Shields v. Barrow, 17 Howard 139**, indispensable parties are defined as those who have such an interest in the controversy that a final decree can not be made without either affecting that interest or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience It is indisputable that the interests of the United States in the waiver in question are such that a final decree can not be made without affecting the interest of the United States, for the decree sought in the action

at bar is not a mere holding that the waiver is a nullity so far as the appellees are concerned. That would be meaningless since the appellees can not and will not seek to avail themselves of the waiver. The decree sought in the action at bar is a cancellation of the waiver for all purposes and all parties. In other words, a destruction of all property rights in the document. The question then arises whether the Government is in such a different position from private parties in this kind of an action that a decree can be entered destroying its property and its interest in property without it having been made a party to that litigation.

The Federal cases dealing with the question of whether the United States is a necessary or indispensable party are numerous. In the case of **Minnesota v. Hitchcock, 185 U. S. 373,** in holding the United States was a party to the action the court used the following language:

> "Now the legal title to these lands was in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seems to restrain the United States from such sale, to divest the Government of its title invested in the state. The United States is, therefore, the

real party affected by the judgment and against which, in fact, it will operate and the officers have no pecuniary interest in the matter. If whether a suit is one against the state is to be determined, not by the fact of the party named as defendant on the record, but by the result of the judgment or decree which may be entered, the same rule must apply to the United States. The question of whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered."

The court further said in the Minnesota case, supra, that the rule on which it decided the case does not, of course, apply to those cases in which officers of the United States are sued in appropriate form to compel them to perform some ministerial duty imposed upon them by law which they wrongfully neglect or refuse to perform, such suits being deemed not suits against the United States within the rule that the United States can not be sued except by its consent.

The case of **Oregon v. Hitchcock, 202 U. S. 62,** was parallel to the Minnesota case, supra, but in the Oregon case the action was dismissed because

the United States had not given its consent to be sued.

As to the Government's immunity from suit there is no distinction between suits directly against the Government and those against its property, and the rule applies to the same extent whether the rights of the United States are affected in a suit directly against it or against its officers or agents. Walker v. Ford, Court of Appeals of District of Columbia, 269 Fed. 877. In the Walker case, supra, suit was brought in ejectment to recover a portion of real estate occupied by the Government Printing Office. The suit was brought against the public printer and his chief clerk, and the court held that it was clear that the action was brought against the property owned by the United States, that the United States was, therefore, a necessary party, and not having given its consent to be sued the action must be dismissed. The opinion quoted from the decision of the Supreme Court in the Minnesota case, supra, is as follows:

> "The question whether the United States is a party to a controversy is not determined by merely the nominal party on record but by the question of the effect of the judgment or decree which can be entered."

In the case of **Wells v. Roper, 246 U. S. 337,** the action was dismissed because the United States was a necessary party. In that case the plaintiff had a contract with the Postmaster General for transportation of mail which was cancelled when the Postmaster General began the use of automobiles purchased by the Government. The action was brought against the Assistant Postmaster General to restrain him from using the Government automobiles. It was held that the Government's interests were so directly involved that the United States was a real party in interest, and not having given its consent to be sued the action should be dismissed.

In **State of Louisiana v. Garfield, 211 U. S. 70,** the action was dismissed because the case involved title to lands claimed by the United States. The action was brought against the Secretary of the Interior and the Commissioner of the General Land Office by the State of Louisiana to establish its title to said lands. The court held that the suit raises questions of law and fact upon which the United States would have to be heard.

In **United States ex rel Goldberg v. Daniels, 231** U. S. 218, it was held that the inability to make the United States a party forbids the maintenance of mandamus to require the Secretary of the Navy

to sell to the highest bidder a cruiser which had been stricken from the Naval register under the Act of August 5, 1882.

In State of Louisiana v. McAdoo, 234 U. S. 627, it was held the immunity of the United States from suit prevents the State of Louisiana as a producer of sugar from maintaining an original bill in the Federal Supreme Court against the Secretary and Assistant Secretary of the Treasury to review their judgment as to the duty to be exacted under a tariff Act.

In **Maryland Casualty Company v. Charleston Lead Works and D. C. Jones, Collector of Internal Revenue, 24 Fed. (2d) 836,** an action was brought by the Maryland Casualty Company as surety on a bond given to the Collector of Internal Revenue as security for the payment of taxes of the Charleston Lead Works, to secure exoneration and obtain enforcement of the lien of the Government upon the property of the Charleston Lead Works. The court held that the United States and not the Collector was the real party in interest and that the action could not, therefore, be maintained.

There are, however, numerous cases holding that the United States is not a necessary or indispensable party to certain actions. Some of them point out quite clearly the dividing line between

which the United States is a necessary party and those in which it is not. An examinaton of those cases will disclose that the United States is never a necessary or indispensable party when the action is brought to restrain an official of the Government from committing an unlawful act or to compel an official to perform some ministerial duty, or to restrain an official from enforcing an unconstitutional statute. Many of these cases expressly state that the decree entered does not conclude the interests of the government but goes only to the unwarranted action of the individual. These cases quite clearly recognize that where the United States is the real party in interest or where its property rights are directly involved it is an indispensable party.

Missouri v. Holland, 252 U. S. 430. This was an action to restrain the United States game warden from enforcing migratory bird law on the ground that it was unconstitutional, and the court held that the United States was not a necessary party.

Board of Liquidators v. MacComb, 92 U. S. 541. This case recognizes the right to enjoin a public official from a positive act threatening his ministerial duty as correlative to mandamus to compel him to perform a ministerial duty. The court held the United States was not a necessary party.

Philadelphia Company v. Stimson, 223 U. S. 620. This was an action to restrain the Secretary of War from instituting certain criminal actions and from interfering with harbor lines laid down by the State of Pennsylvania. In holding that the United States was not a necessary party, the court spoke as follows:

> "The exception of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded (citing cases), and in case of an injury threatened by his illegal action the officer can not claim immunity from injunction process. The principle has frequently been applied * * *"

In the case of United States v. Lee, 106 U. S. 196, which is frequently cited to show that the United States is not a necessary party, an action was brought against two army officers who were in possession of Arlington Cemetery. The court held that their possession was unlawful and held that the United States was not a necessary party. In that case the court passed only on the question of whether or not the defendants were trespassers, and expressly stated that the decision did not include the rights of the United States. The case is commented upon and distinguished in Walker v. Ford, supra.

In the case of **Thornhill Wagon Company v. Noel, 17 Fed. (2d) 407,** the questions we are now discussing were raised but were not decided. In that case the court did say, however: "I do not think United States are a necessary party (citing Goltra v. Weeks, B. C., decided June 7, 1926.)" There is nothing new or startling in the decision of Goltra v. Weeks. The decision simply proceeds on the theory that a bill in equity can be brought against an agent of the United States Government to restrain a trespass or other unlawful act. The following language discloses the nature of the action and the ground on which the Supreme Court's decision was based:

> "We can not agree with the Circuit Court of Appeals that the United States was a necessary party to the bill. The bill was suitably framed to secure the relief from an alleged conspiracy of the defendants without lawful right to take away from the plaintiff the boats of which by lease or charter he alleged that he had acquired the lawful possession and enjoyment for a term of five years. He was seeking equitable aid to avoid a threatened trespass upon that property by persons who were government officers. If it was a trespass, then the officers of the Government should be restrained whether they professed to be acting

for the Government or not. Neither they nor the Government which they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceeding by a court of competent jurisdiction, even though the United States for whom they may profess to act is not a party and can not be made one. By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in asserted agency for the Government."

The case of **Cunningham v. Macon & Brunswick R. R. Co., 109 U. S. 446,** gives quite a thorough review of all the decisions involving the question of whether or not the Government is a necessary party to a suit. In that case the State of Georgia had endorsed bonds of a railway company, and, upon default, had taken possession of the road, put it into the hands of a receiver, and made a sale for the State. The suit was brought by other lienholders against the Governor and Treasurer of the State of Georgia, and in dismissing the bill because the State was not a party, the lower court spoke as follows:

'The bill is to all intents and purposes a suit against the State. It is mainly her property, and not that of Alfred H. Colquitt or J.

W. Renfroe, that is to be affected by the decree of this court. It is the title of the State that is assailed. The attack is not made against the State directly, but through her officers. This indirect way of making the State a party is just as open to objection as if the State had been named as a defendant. 3 Wood's R, 426."

In affirming the lower court, the Supreme Court spoke in part as follows:

"In the case now under consideration the State of Georgia is an indispensable party. It is in fact the only proper defendant in the case. No one sued has any personal interest in the matter or any official authority to grant the relief asked.

"No foreclosure suit can be sustained without the State, because she has the legal title to the property, and the purchaser under a foreclosure decree would get no title in the absence of the State. The State is in the actual possession of the property, and the court can deliver no possession to the purchaser. The entire interest adverse to plaintiff in this suit is the interest of the State of Georgia in the property, of which she has both the title and possession."

In its opinion, the Supreme Court speaks as

follows of the leading case of United States v. Lee, supra:

> "To this class belongs also the recent case of United States v. Lee, 106 U. S. 196, for the action of ejectment in that case is, in its essential character, an action of trespass, with the power in the court to restore the possession to the plaintiff as part of the judgment. And the defendants, Strong and Kaufman, being sued individually as trespassers, set up their authority as officers of the United States, which this court held to be unlawful, and therefore insufficient as a defense. The judgment in that case did not conclude the United States, as the opinion carefully stated, but held the officers liable as unauthorized trespassers, and turned them out of their unlawful possession."

Another leading case is that of **Head v. Porter, 48 Fed. 481,** which was an action in tort brought against an individual, an army officer of the United States, for the unlawful infringement of patent rights of the plaintiff. Suffice to say that case could have no bearing on the case at bar by reason of the fact that so far as we have been able to discover the authorities are unanimous in holding that an individual though he be an officer of the State or United States is personally liable for his unlawful acts. The facts and holding in our opinion

bear no relation to the case at bar in which no damages against an individual officer for his wrongful acts are sought but a decree is asked cancelling, setting aside and destroying a written document, the property of the United States.

Several decisions of the Supreme Court of the United States are cited and quoted in the opinion handed down by the court in **Head v. Porter,** supra. The first is the opinion of Chief Justice Marshall in Osborn v. Bank, 9 Wheat. 738. An examination of the facts as they are set out on page 845 of the opinion follows:

> "But, were it even to be admitted that the injunction, in the first instance, was improperly awarded, and that the original bill could not be maintained, that would not, we think, materially affect the case. An amended and supplemental bill, making new parties, has been filed in the cause, and on that bill, with the proceedings under it, the decree was pronounced. The question is, whether that bill, and those proceedings, support the decree.
>
> "The case they make, is, that the money and notes of the plaintiffs in the circuit court, have been taken from them without authority, and are in possession of one of the defendants, who keeps them separate and apart from all

other money and notes. It is admitted that this defendant would be liable for the whole amount in an action at law; but it is denied that he is liable in a court of equity.

"We think it a case in which a court of equity ought to interpose, and that there are several grounds on which its jurisdiction may be placed.

"One, which appears to be ample for the purpose, is, that a court will always interpose to prevent the transfer of a specific article, which, if transferred, will be lost to the owner. Thus, the holder of negotiable securities, endorsed in the usual manner, if he has acquired them fraudulently, will be enjoined from negotiating them; because, if negotiated, the maker or indorser must pay them. 1 Mad. 154, 155. Thus, too, a transfer of stock will be restrained in favor of a person having the real property in the article. In these cases, the injured party would have his remedy at law; and the probability that this remedy would be adequate, is stronger in the cases put in the books than in this, where the sum is so greatly beyond the capacity of an ordinary agent to pay. But it is the province of a court of equity, in such cases, to arrest the injury, and prevent the wrong. The remedy is more bene-

> ficial and complete than the law can give. The money of the bank, if mingled with the other money in the treasury, and put into circulation, would be totally lost to the owners; and the reason for an injunction is, at least, as strong in such a case as in the case of a negotiable note."

In the Osborn case, supra, we can see no application of the principles there laid down to the case at bar. The decree sought in the case at bar is not one against the officers restraining them from any act, but is a decree against the property which is not their property but property of the United States.

In Philadelphia Company v. Stimson, 273 U. S. 605, Justice Hughes at page 622 of the opinion says:

> "In dealing with these objections, it is important to observe the precise nature of the suit. It was not to determine a controversy as between conflicting claimants under the local law. It was not to restrain trespass. Northern Indiana R. R. Co. v. Michigan Central R. R. Co., 15 How. 233; Ellenwood v. Marietta Chair Company, 158 U. S. 105. It was not brought to try the naked question of the title to the land. Massey v. Watts, 6 Cranch, 148, 158.

While the complainant's title lay at the foundation of the suit, and it would be necessary for the complainant to prove it, if denied, still if its title to the land under water were established or admitted to be as alleged, the question would remain whether **the defendant** in imposing restrictions upon the use of the property was acting by virtue of authority validly conferred by a general act of Congress. This was the principal question which the complainant sought to have determined. The defendant is within the district, amenable to the process of the court. There is no ground upon which it may be denied jurisdiction to decide whether **he should be restrained from continuing his opposition** to the complainant's plan of improvement. Rather should it be said that the case falls within the general rule sustaining the jurisdiction of a court of equity which has control of the person of the defendant and **may compel obedience** to its decree. Phelps v. McDonald, 99 U. S. 298, 308."

It is observed from the above language that the court in the Stimson case was acting purely in personam. The following comment on the Stimson case, taken from the court's opinion in Blank v. Blank, 207 Fed. 6, is very clarifying and suggestive:

"The general rule is well established that

where the necessary parties are before a court of equity it is immaterial that the subject matter of the controversy, whether real or personal property, is beyond the territorial jurisdiction of the court. In such case the power exists to compel the defendant to do all things necessary, which he could do voluntarily, to give full effect to the decree against him. Courts in such cases consider the equities between the parties, and make decrees **in personam,** according to such equities, enforcing obedience to their decrees by means of process **against the person.** This principle has been recognized in numerous cases. (Citing Philadelphia v. Stimson and other cases.)

"Indeed in Philadelphia Co. v. Stimson, 223 U. S., at page 623, 32 Sup. Ct. 340, 56 L. Ed. 570, which was not a case of fraud, contract, or trust, the Supreme Court of the District of Columbia was expressly held up on a bill filed to set aside certain harbor lines in the harbor of Pittsburgh, Pennsylvania, **to have jurisdiction to restrain the Secretary of War from causing a criminal proceeding to be instituted** against the complainant because of the reclamation and occupation of its land outside the prescribed limits." (Quoting in part what has

been set out above from the opinion in the case of Philadelphia Co. v. Stimson.)

In the Stimson case the court had before it the Secretary of War, and the decree to be entered in the case in the event the plaintiff prevailed was one restraining the Secretary from doing some act or acts which under the law he was not authorized to do, and possibly to direct him to do some act or acts which under the law he should be compelled to do. Since the action or restraint sought by the bill fell wholly within the scope of the duties of the Secretary of War, it is obvious that a decree in personam against him alone would be entirely effective. Since the only decree sought was in personam and involved no other person than the Secretary of War, the action was proper and jurisdiction complete without the joining of any other parties. The situation in the case at bar is entirely different. The decree in the present case is not sought against the appellees to restrain them or to compel them to do anything. They have no title, power, or control over or in the document which is the subject matter of the litigation. While a decree against the Secretary in the Stimson case would be entirely effective, a decree limited to the appellees alone in the case at bar would be futile as the defendants are not the real parties in the case, their relationship being merely incidental.

They are not even necessary parties to the action. **Donovan v. Campion, 85 Fed. 72.** If a decree had been entered by the court below, what would have been its effect? Possibly one whereby the appellees would be perpetually enjoined and restrained from using the document in question, which would be meaningless for the only party who could make use of the document is the United States in a suit or other proceeding in its own name to collect taxes. Moreover, such a decree would not be effective against the appellees' successors in office. While the Stimson case and similar cases are actions in personam in which decrees in personam are sufficient, the instant case is virtually an action **in rem** in which a decree in personam would be entirely ineffective.

Actions for the collection of taxes are instituted by the United States on authorization by the Commissioner of Internal Revenue. In the event a taxpayer refuses to pay his taxes, the Commissioner of Internal Revenue authorizes the United States Attorney to institute appropriate proceedings against the taxpayer for the collection of the tax. The Commissioner of Internal Revenue is appointed by the President of the United States to administer the laws of the Internal Revenue Department of the United States Government. It is not his duty to collect taxes, but it is his duty to administer the

laws. There are only two agencies whereby the United States collects its revenue, viz.: the Collector of Internal Revenue to whom payment is voluntarily made by the taxpayer, or who by summary proceedings known as distraint proceedings seizes property of the taxpayer and sells the same for payment of the tax; the other method is suit by the United States. The Collector of Internal Revenue is not an agent in any sense of the word of the Commissioner of Internal Revenue. He is an officer appointed by the President of the United States and is not answerable to the Commissioner. His duty is defined by statute, and he is charged with the duty of collecting the taxes by certain proceedings as heretofore outlined. In the event that it becomes necessary to sue for taxes that duty is imposed upon the United States through its legal machinery. A decree in the case at bar against the Collector restraining him from operating under the waiver in question would in no wise operate to restrain the Commissioner from authorizing a suit in the name of the United States, nor would it prohibit the United States from instituting a suit against the appellant for the collection of the tax, and no decree of the court below would be binding nor controlling on the United States or upon the Commissioner of Internal Revenue.

Inasmuch as the only subject matter in this suit is a written document which is the property of the United States, it seems clear that the case falls squarely in line with the cases cited above holding that the United States is an indispensable party. This is not an action to restrain any official from an alleged unlawful act, nor to oust a trespasser from the possession of property to which the Government might assert some claim, but on the contrary is an action to destroy property in which no one has any rights or interest save and except the United States. The United States would be the only party affected by a decree to be entered in the case.

It should be borne in mind that on September 25, 1925, when the distraint warrant was issued and served, and on September 26, 1925, when the waiver agreement involved in this suit was executed, that taxes aggregating $172,110.35 had been regularly assessed against appellant and that said taxes were unpaid.

The law (Section 3183, R. S.) made it the duty of the Collector and his deputies to collect these taxes. The duty of the Collector is ministerial, not judicial.

Accardo v. Fontenot, 269 Fed. 447.

It was the duty of the Collector to collect the tax, not to judicially determine whether or not the tax is illegal, unconstitutional or outlawed.

Bailey v. George, 259 U. S. 16.
Graham v. Du Pont, 262 U. S. 234.

In pursuance of his legal duties, the Collector issued his distraint warrant and proceeded to collect the unpaid tax. The actions of the Collector were not wrongful, fraudulent, illegal, invalid, tortious, nor duress as claimed by appellant. The Collector was not only within his legal rights, but he was performing a duty specifically enjoined upon him by Section 3183 of the Revised Statutes.

We desire to call the Court's attention to the Bill of Complaint in this case, and request that the allegations of the complaint be compared with the statements in appellant's brief. In the complaint there is a complete lack of such words as "wrongful", "illegal", "invalid", "tortious", "coercion", "intimidation", "excess of official authority", "impelled and procured", "induced and procured", "in positive violence of appellant's rights", "in violation of law", "in excess of his legal rights and duties", "coerced and compelled" and many similar expressions repeatedly used in appellant's brief, accompanied by the statement that appellee's motion to dismiss admits the truthfulness of appel-

lant's complaint and that the acts of the Collector were wrongful, illegal, etc.

A part of Paragraph II of the Complaint reads as follows:

> "On September 26, 1925, the respondents, acting in their official capacity, obtained and procured from complainant by means of fraud and duress as hereinafter more particularly stated, etc."

This is the only mention in the complaint of any coercion or wrongful act on the part of appellee and we respectfully submit that appellant is not justified in stating in its brief that appellees admit that their acts were wrongful, illegal, invalid, tortious and in violation of the law as argued in appellant's brief.

When the warrant of distraint was served on appellant, the appellant had the right to avail itself of its legal remedy (26 U. S. C. A. Section 149-156) or to substitute therefor some other remedy. The legal remedy of the taxpayer is to pay the tax and, if the same was illegally collected, to recover the same by suit. The courts have repeatedly held that the remedy provided for the taxpayer by law is adequate and exclusive.

Ellay Company v. Bowers, 25 Fed. (2nd) 634.

Snyder v. Marks, 109 U. S. 189.
Dodge v. Osborn, 240 U. S. 118.

In this case the taxpayer did not desire to follow its legal remedy, but followed another course, which to the taxpayer appeared to be more acceptable. It is evident that both the taxpayer and the collector, at the time of the execution of the waiver, believed that the collector might collect the tax by distraint within six years from the assessment. The waiver itself states that such was the opinion of the parties to it, and we think that such was the general opinion at the time; but whatever the parties may have thought the law to be, the taxpayer had his legal right to pay the tax and if the same was illegally collected, to recover it back by suit. The tax was not paid, but in lieu of payment the taxpayer executed the waiver which appellant now seeks to cancel. The waiver was executed to prevent a forced payment of the tax. If the waiver had not been executed, the collection of the tax could and would have been made and no court would have enjoined or interfered with the collection.

26 U. S. C. A. Section 154; Section 3224 Revised Statutes.

There was a good and valuable consideration for the execution of the waiver and the taxpayer having executed the waiver in preferenc to fol-

lowing its legal right—that of paying the tax and bringing suit to recover it back—it can not now be said that there was no consideration for the waiver and that the same was illegally obtained from the taxpayer.

Appellant contends that the Collector acted without authority in securing the waiver, and that such waiver can not be the property of the United States, because the Collector was not acting for the United States in securing the waiver. In this connection we call attention to the case of Gouge v. Hart, 250 Fed. 802-811, in which the court uses this language:

> "In the case at bar, the alleged wrong done complainants can not be regarded as done by the defendants as individuals. An assessment against E. Gouge & Company made by W. H. Osborne as an individual, would have been a nullity. A distraint and sale of plaintiff's real estate by John M. Hart as an individual would likewise have been a futile absurdity. It is only because the defendants respectively occupied the official positions of Commissioner and Collector of Internal Revenue that their acts have at least such color of authority and legal force as to cloud the title of complainants. The defendants here, therefore, can not be re-

garded as wrongdoers in their character as individuals. The complaint is made against them because of acts done officially; and in no sense could the judgment of the court if the relief prayed for were given, operate on the defendants as individuals. The court admittedly can not enjoin the defendants from again selling the same land for the same tax. All that the court could do would be to declare that the sale already made shall be set aside and held for naught. Such decree directly operates on the title of the Government, but does not, as it seems to me, operate on the defendants."

The authorities clearly hold that when a tax has been levied by the proper officers under a statute permitting the same, that the court will not attempt to enjoin the collection of the tax, even though it may appear that the statute of limitations may have run against its collection or that the statute under which the tax was levied may be unconstitutional. The courts hold that the taxpayer is provided with an adequate remedy at law in that he should pay the tax and seek to recover back the same, if illegally collected. In the case of Ellay v. Bowers, 25 Fed. (2d) 637, the court says:

"Even if the tax may prove to be illegal, it does not alter the fact that the amount collected is a tax and is collectible as such * * *

The argument that the tax is not a tax because of the statute of limitations was disposed of in Bailey v. George, 59 U. S. 16; Dodge v. Oregon, 240 U. S. 118."

CONCLUSION

It is submitted that the judgment of the District Court is correct and that the same should be affirmed.

GEORGE NEUNER,
United States Attorney
for the District of Oregon.
J. W. McCULLOCH,
Assistant United States
Attorney.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,
GEORGE G. WITTER,
Special Attorney,
Bureau of Internal Revenue,
Seattle, Washington,
HARRISON F. McCONNELL,
Special Attorney,
Bureau of Internal Revenue,
Washington, D. C.,
Of Counsel.

No. 5745

United States Circuit Court of Appeals

For the Ninth Circuit.

PACIFIC HUNTING AND FISHING COMPANY, an Oregon Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5745

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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EXHIBITS:

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

J. N. GILLETT and H. H. NORTH, Merchants Exchange Building, San Francisco, California,
Attorneys for Plaintiff.

GEORGE J. HATFIELD, Esq., United States Attorney,
Attorney for Defendant.

In the District Court of the United States, Northern District of California, Southern Division.

No. 17,341.

PACIFIC HUNTING AND FISHING COMPANY, an Oregon Corporation,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT.

Plaintiff complains and alleges:

I.

That on the 7th day of June, 1924, the Congress of the United States passed the following Act:

An Act to confer jurisdiction upon the United States District Court, Northern District of California, to adjudicate the claims of American citizens.

"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That jurisdiction be, and it is hereby, conferred upon the United States District Court, Northern District of California, to hear and determine the claims of American citizens, their heirs and legal representatives, for damages or loss occasioned by or resulting from the seizure, detention, sale or interference with their voyage by the United States of vessels charged with unlawful sealing in the Bering Sea and water contiguous thereto and outside of the three-mile limit during the years 1886 to 1896, inclusive, and to enter judgment therefor.

Sec. 2. That all American citizens whose rights were affected by said seizure, detention, sale or interference [1*] specifically referred to in section 1 hereof during the years 1886 to 1896, inclusive, may submit to the United States District Court in and for the Northern District of California their claims thereunder, and the court shall render judgment thereon.

Sec. 3. That claims not presented within two years from the passage of this Act shall hereafter be forever debarred.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

Approved, June 7, 1924.

II.

That at all of the times herein mentioned the Pacific Hunting and Fishing Company was an American corporation, duly incorporated and existing under the laws of the State of Oregon, United States of America, with its principal place of business at Astoria, Oregon; and at all of the times herein mentioned the said corporation was the owner of and in possession of that certain schooner known as the "Bessie Rutter," an American schooner of 30.33 tons net burden, registered measurement, and especially equipped and outfitted for hunting fur seal on the high seas.

That on the 17th day of March, 1891, said vessel, equipped with a sealing outfit and furnished with a crew consisting of fifteen men, including Henry Olssen as master, was duly cleared from the United States Custom-house at the port of Astoria, State of Oregon, for a hunting and fur sealing voyage in the North Pacific Ocean and Bering Sea.

III.

That on the 29th day of June, 1891, in pursuit of said voyage, as plaintiff is informed and believes, said vessel had reached a point at or near the Popoff Islands, off the coast of Alaska, in the North Pacific Ocean and more than three miles from shore; that at that time and place, as plaintiff is informed and [2] believes, said schooner was boarded by an officer of the United States vessel "Thetis," then on duty in said waters, and acting

upon advice and instructions of said defendant, thereupon delivered to the master of said vessel a warning and prohibition against said vessel entering the waters of Bering Sea for the purpose of fur seal hunting or for any purpose upon pain of seizure and forfeiture.

IV.

That by reason of the foregoing warning, and service of said notice upon the master of said vessel as aforesaid, prohibiting said vessel from entering Bering Sea, said voyage was then and there broken up and the said Pacific Hunting and Fishing Company, as the owner of said vessel, was then and there deprived of the benefits and profits of a reasonably probable and prospective catch of fur seals on said voyage for the sealing season of 1891; and said vessel was forced thereby to return to its home port and to then and there abandon said sealing voyage.

That the number of fur sealskins that said vessel was thus prevented from taking during the said sealing season of 1891 estimated from the capacity of said vessel, its outfit, crew, abundance of seals in said waters at that time and for said season reasonably amounted to 1,400, and were reasonably worth the sum of thirty-six thousand four hundred dollars ($36,400); and the said Pacific Hunting and Fishing Company was damaged and suffered a loss in that amount.

WHEREFORE, plaintiff asks judgment against said defendant in the sum of thirty-six thousand

four hundred dollars ($36,400), and for costs of this action.

J. N. GILLETT,
H. H. NORTH,
Attorneys for Plaintiff,

Merchants Exchange Building, San Francisco, California. [3]

County of Clatsop,
State of Oregon,—ss.

A. G. Spexarth, being first duly sworn, deposes and says: I am the president of the plaintiff corporation the Pacific Hunting and Fishing Company, named in the above-entitled action; I make this affidavit in behalf of said corporation; that I have read the foregoing complaint and know the contents thereof and the same are true of my own knowledge, except as to those matters therein stated on information and belief, and as to those matters I believe it to be true.

A. G. SPEXARTH.

Subscribed and sworn to before me this 24th day of March, 1925.

[Seal] FRANK SPITTLE,
Notary Public in and for the County of Clatsop, State of Oregon.

My commission expires October 4th, 1927.

[Endorsed]: Filed Apr. 8, 1925.

(Title of Court and Cause—No. 17,341.)

ANSWER.

Defendant above named, by Sterling Carr, United States Attorney for the Northern District of California, and Frank Maytham, Special Assistant to the Attorney General, answering the complaint therein:

I.

Admits that on June 7, 1924, the Congress of the United States passed the Act set forth in paragraph I of the complaint.

II.

Has no knowledge or information as to the allegations contained in paragraph II of the complaint and demands of plaintiff strict proof thereof. [4]

III.

Has no knowledge or information as to the allegations contained in paragraph III of the complaint and demands of plaintiff strict proof thereof.

IV.

Denies the allegations contained in paragraph IV of the complaint.

WHEREFORE, defendant prays plaintiff take

nothing and that the complaint be dismissed with costs and disbursements of this action.

STERLING CARR.
STERLING CARR,
United States Attorney,
FRANK MAYTHAM.
FRANK MAYTHAM,
Special Assistant to the Attorney General,
Attorneys for Defendant.

Service of copy of the within answer and receipt of copy thereof is hereby admitted this 6 day of July, 1925.

J. N. GILLETT,
H. H. NORTH,
Attorneys for Plaintiff.

[Endorsed]: Filed July 7, 1925.

(Title of Court and Cause—No. 17,341.)

STIPULATION TO WAIVE TRIAL BY JURY, ETC.

IT IS HEREBY STIPULATED by and on behalf of the parties hereto:

I.

That trial by jury is hereby waived and that this case may be heard by the Court sitting without a jury. [5]

II.

IT IS FURTHER STIPULATED, That the pelagic fur seal-hunting season in the Bering Sea

begins about the first day of July and extends to about the middle of September in each season between the years 1886 and 1893, inclusive.

III.

AND FURTHER, That the average catch of fur seal per small hunting boat during the said season of each of the said years within that zone would have been as follows: If a boat were manned by a hunter and two seamen, the average catch for the entire season would be three hundred seals; if manned by a hunter and one seaman, two hundred seals; and if the boat were operated by one hunter alone, the average catch would be one hundred seals.

IV.

IT IS FURTHER STIPULATED, That the value of the sealskins to the owner of the sealing vessel during the year 1891 was $14.233 per skin.

V.

IT IS FURTHER STIPULATED, That the average cost of shooting a fur seal at the times involved in the present action was five cents per seal; and that the average cost of feeding the men constituting the crew of the vessel at the times involved was fifteen cents per day per man;

AND that the defendant is entitled to a deduction from the damages allowed in the foregoing amount per day for each day that said vessel arrived at its home port—in Puget Sound prior to September 22, or at San Francisco prior to September 27.

Dated: This 17 day of July, 1928.

J. N. GILLETT,
H. H. NORTH,
Attorneys for Plaintiff.
GEO. J. HATFIELD,
United States Attorney,
By ESTHER B. PHILLIPS,
Assistant U. S. Attorney,
Attorneys for Defendant.

[Endorsed]: Filed July 17, 1928. [6]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 29th day of October, in the year of our Lord one thousand nine hundred and twenty-eight. Present: the Honorable HAROLD LOUDERBACK, United States District *Court.*

(Title of Cause—No. 17,341.)

MINUTES OF COURT—OCTOBER 29, 1928—ORDER DIRECTING ENTRY OF JUDGMENT IN FAVOR OF DEFENDANT.

This cause, heretofore tried and submitted, being now fully considered, IT IS ORDERED that judgment be entered herein in favor of defendant on findings to be filed. [7]

(Title of Court and Cause.)

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

I.

In the year 1891 the American Schooner "Bessie Rutter" of Astoria, Oregon, was owned by the plaintiff, a duly incorporated corporation of the State of Oregon, with its principal place of business at Astoria, Oregon. The charter of said corporation thereafter lapsed, but prior to the commencement of this suit was restored by the State of Oregon. Said corporation was an American citizen.

II.

On or about the 17th day of March, 1891, said schooner cleared from the port of Astoria, Oregon, for Sand Point, Alaska, and from Sand Point, Alaska, she cleared for Yokohama, Japan. I find that at no time did said vessel engage in or undertake a voyage to Bering Sea for fur sealing.

III.

On June 29, 1891, the "Bessie Rutter" had reached a point near the Popoff Islands in the North Pacific Ocean, south of Bering Sea, and at that time and place, the schooner was boarded by an officer of the United States vessel "Thetis," upon the advice and instructions of the defendant, and that a warning and prohibition was then delivered to the master of the "Bessie Rutter" by said officer of

the "Thetis" against entering the waters of Bering Sea for the purpose of fur seal hunting.

IV.

I further find that said act of the "Thetis" or her officers did not interfere with the proposed voyage [8] of the "Bessie Rutter," for said vessel was not engaged in a voyage to Bering Sea.

CONCLUSIONS OF LAW.

As a conclusion of law from the foregoing facts, I find that the owner of the "Bessie Rutter' is not entitled to damages.

Judgment is hereby ORDERED entered in behalf of the defendant.

HAROLD LOUDERBACK,
United States District Judge.

Dated: January 12th, 1929.

[Endorsed]: Filed January 12th, 1929. [9]

In the Southern Division of the United States District Court for the Northern District of California.

No. 17,341.

PACIFIC HUNTING AND FISHING COMPANY, an Oregon Corporation,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT ON FINDINGS.

This cause having come on regularly for trial on the 18th day of September, 1928, before the Court sitting without a jury, a trial by jury having been waived by written stipulation filed; J. N. Gillett and H. H. North, Esqrs., appearing as attorneys for plaintiff, and Esther B. Phillips, Assistant United States Attorney, appearing as attorney for defendant, and the trial having been proceeded with and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation having rendered its decision and filed its findings, and ORDERED that judgment be entered in accordance with said findings.

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that plaintiff take nothing by this action and that defendant go hereof without day; without costs to either party.

Judgment entered January 12th, 1929.

WALTER B. MALING,
Clerk. [10]

(Title of Court and Cause—No. 17,341.)

CERTIFICATE OF CLERK TO JUDGMENT-ROLL.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

ATTEST my hand and the seal of said District Court this 12th day of January, 1929.

WALTER B. MALING,
Clerk.
By A. C. Aurich,
Deputy Clerk.

[Endorsed]: Filed December 12th, 1929. [11]

(Title of Court and Cause—No. 17,341.)

PLAINTIFF'S BILL OF EXCEPTIONS.

BE IT REMEMBERED, That heretofore, to wit, on the 19th day of September, 1928, the above-entitled action came regularly on for trial in the above-entitled court before Honorable Harold Louderback, one of the Judges thereof, sitting without a jury.

The plaintiff appeared by Messrs. J. N. Gillett and H. H. North, its attorneys, and the defendant appeared by George J. Hatfield, United States At-

torney, and Esther B. Phillips, Assistant United States Attorney, its attorneys.

WHEREUPON the following proceedings were had:

A written stipulation signed by the parties which had been previously filed, was admitted in evidence as follows:

"IT IS HEREBY STIPULATED by and on behalf of the parties hereto:

I.

That trial by jury is hereby waived and that this case may be heard by the Court sitting without a jury.

II.

IT IS FURTHER STIPULATED, That the pelagic fur seal hunting season in the Bering Sea begins about the first day of July and extends to about the middle of September in each season [12] between the years 1886 and 1893, inclusive.

III

AND FURTHER, That the average catch of fur seal per small hunting boat during the said season of each of the said years within that zone would have been as follows: If a boat were manned by a hunter and two seamen, the average catch for the entire season would be three hundred seals; if manned by a hunter and one seaman, two hundred seals; and if the boat were operated by one hunter alone, the average catch would be one hundred seals.

IV.

IT IS FURTHER STIPULATED, That the value of sealskins to the owner of the sealing vessel during the year 1891 was $14.233 per skin.

V.

IT IS FURTHER STIPULATED, That the average cost of shooting a fur seal at the times involved in the present action was five cents per seal; and that the average cost of feeding the men constituting the crew of the vessel at the times involved was fifteen cents per day per man;

AND that the defendant is entitled to a deduction from the damages allowed in the foregoing amount per day for each day that said vessel arrived at its home port—in Puget Sound prior to September 22, or at San Francisco prior to September 27.

Dated: This 17th day of July, 1928.

J. N. GILLETT,
H. H. NORTH,
Attorneys for Plaintiff.
GEO. J. HATFIELD,
United States Attorney,
By ESTHER B. PHILLIPS,
Assistant U. S. Attorney,
Attorneys for Defendant.

Duly filed July 17, 1928. [13]

PLAINTIFF'S EXHIBIT No. 2.

Permanent Register Number 4.

Official Number 3419.

IN PURSUANCE OF CHAPTER ONE, TITLE XLVIII, "Regulations of Commerce and Navigation of the Revised Statutes of the United States.

PACIFIC HUNTING & FISHING COMPANY, a corporation, incorporated under the laws of Oregon is the only owner of the vessel called the "Bessie Rutter" of Astoria, Oregon, whereof Henry Olsen is at present master; that said vessel was built at Astoria, Oregon, in the year 1889 as appears by former certificate of registry numbered five (5) issued at Astoria, Oregon, April 7th, 1890; said vessel has a total tonnage of 30.33 tons. Said vessel has been duly registered at the Port of Astoria, Oregon.

GIVEN under my hand and seal at the Port of Astoria, Oregon, this 17th day of March, in the year One Thousand Eight Hundred and Ninety-one.

[Seal] F. L. PARKER,
Deputy Collector of Customs.

PLAINTIFF'S EXHIBIT No. 7.

"General Customs Regulations 1874.

Form 54. (Cat. No. 479)

CREW BOND.

KNOW ALL MEN BY THESE PRESENTS, That we, Henry Olsen, master or commander of the

Schooner called the 'Bessie Rutter' now lying in the port of Astoria, *and* are held and firmly bound unto the United States of America in the full and just sum of four hundred dollars, money of the United States, to which payment, well and truly to be made, we bind ourselves, jointly and severally, our joint and several heirs, executors, and administrators, firmly by these presents. Sealed with [14] our seals and dated this 17th day of March, in the year one thousand eight hundred and ninety-one.

Whereas, the above-bounden Henry Olsen hath delivered to the Collector of the Customs for the District of Oregon in the State of Oregon, a verified list, containing, as far as he can ascertain them, the names, places of birth, residence, and description of the persons who compose the company of the said Schooner called the 'Bessie Rutter,' now lying in the said port, of which he is at present master or commander, of which list the said Collector has delivered to the said Henry Olsen a certified copy. Now the condition of this obligation is such that if the said Henry Olsen shall exhibit the aforesaid certified copy of the list to the first boarding officer at the first port in the United States in which he shall arrive on his return thereto, and then and there shall produce the persons named therein to the said boarding officer, except any of the persons contained in the said list who may be discharged in a foreign country, with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent there residing, sig-

nified in writing under his hand and official seal, to be produced to the Collector of the district within which he may arrive, as aforesaid, with the other persons comprising the crew, as aforesaid, or who may have died or absconded, or who may have been forcibly impressed into other service, of which satisfactory proof shall be then also exhibited to the said last-mentioned Collector, then, and in such cases, the above obligation shall be void; otherwise, it shall abide and remain in full force and virtue.

HENRY OLSEN. (Seal)
M. M. KETCHUM. (Seal)

Sealed and delivered in the presence of
F. L. PARKER.

[Endorsed]: I certify this to be a true copy from the original now on file in this office. P. M. Lamb, Deputy Collector, Custom-house, Astoria, Oregon. Deputy Collector's Office, Mar. 16, 1925." [15]

PLAINTIFF'S EXHIBIT No. 4.

"June 15, 1891.

Commanding Officer U. S. Steamer MOHICAN,
San Francisco, Cal.

Obtain immediately from Collector of Customs, San Francisco, printed copies of President's proclamation in reference to Bering Sea. On receipt of such copies proceed with all despatch to the vicinity of the Pribiloff Islands, St. Paul and St. George. Notify all American and British persons and vessels you meet of the proclamation, and give them copies of the same. Warn all persons and vessels of either nationality engaged in sealing in

Bering Sea east of the line of demarkation as shown on Hydrographic Office chart number 68 to leave those waters forthwith. Make entry of warning on register or log of sealer. Seize any American or British persons and vessels found to be or to have been engaged in sealing after notice, within the prohibited waters and bring or send them in charge of a sufficient force to ensure delivery to nearest convenient port of their own country together with witnesses and proofs and there deliver them to proper officer or court in said port. Send at least the master of the seized vessel, her mate or boatswain, all her cargo, and such of her crew as you may deem safe, in the seized vessel. At time of seizure, draw up declaration in writing showing condition of seized vessel, place and date of seizure, giving latitude and longitude, and circumstances showing guilt. Sign declaration and send with ship's papers and seized vessel to officer of court. Deliver to master of seized vessel signed and certified list of papers found on board. Officer in charge of seized vessel will at time of delivering vessel's papers to court sign a certificate stating any changes that may have taken place in respect to vessel, crew or cargo since seizure. [16]

"Keep list of all vessels to which notice of proclamation has been given, and furnish all United States and British War or Revenue vessels with copies of list. Before sailing get order from Alaska Commercial Company, San Francisco, to coal at Ounalaska. After two weeks cruising in neighborhood of Pribiloff Islands rendezvous at

Sand Point, Popoff Island, and await there further instructions by MARION.

Furnish copy of this order to commanding officer of ALERT and direct him to comply with it.

(Signed) TRACY."

"June 16, 1891.

Commander C. S. Cotton.

Commanding U. S. Steamer MOHICAN,
San Francisco, Cal.

CONFIDENTIAL.

Until further instructed you are placed in command of all United States vessels of war cruising in the neighborhood of Bering Sea, and you will distribute the force in such manner as in your judgment will best enable you to comply with the orders of the Department and the requirements of the President's proclamation. Instruct vessels under your command to send all seized persons and vessels to Unalaska, to which point chartered steamer will be sent from San Francisco with Marine guard. Steamer will be at your disposal. Instructions have been sent to revenue cutters to turn over persons and vessels seized by them to you at Unalaska. Utilize the chartered steamer to the best advantage to assist in executing the proclamation and to hand over as soon as practicable all seized persons and vessels to authorities of nation to which they respectively belong. Orders directing THETIS, ALERT and MOHICAN to rendezvous at Sand Point revoked. THETIS will proceed to Sand Point as directed to distribute procla-

mation and give notice and will proceed thence to Unalaska immediately [17] after departure of British steamer which visits Sand Point about July first to bring home coast catch of seal. MOHICAN and ALERT after cruising two weeks as previously directed in Bering Sea will rendezvous with THETIS at Unalaska instead of Sand Point. MARION will sail later and join your command at Unalaska at about same time. Has THETIS already sailed? If so you must communicate with her at Sand Point where her orders of yesterday directed her to await your arrival. On receipt of this order proceed immediately to Bering Sea with THETIS, MOHICAN and ALERT. Telegraph departure.

(Signed) B. F. TRACY."

(U. S. Statutes at Large—52d Cong.—1891/93)

(2)

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

Whereas an agreement for a *Modus Vivendi* between the Government of the United States and the Government of Her Britannic Majesty, in relation to the Fur Seal Fisheries in Behring Sea, was concluded on the fifteenth day of June in the year of our Lord one thousand eight hundred and ninety-one, word for word as follows:

AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES AND THE GOVERNMENT OF HER BRITANNIC MAJESTY FOR A MODUS VIVENDI IN RELATION TO THE FUR SEAL FISHERIES IN BEHRING SEA.

For the purpose of avoiding irritating differences and with a view to promote the friendly settlement of the questions pending between the two Governments touching their respective rights in Behring Sea, and for the preservation of the seal species, the following agreement is made without prejudice to the rights or claims of either party. [18]

"(1) Her Majesty's Government will prohibit, until May next, seal killing in that part of Behring Sea lying eastward of the line of demarkation described in Article No. 1 of the Treaty of 1867 between the United States and Russia, and will promptly use its best efforts to ensure the observance of this prohibition by British subjects and vessels.

(2) The United States Government will prohibit seal killing for the same period in the same part of Behring Sea and on the shores and islands thereof, the property of the United States (in excess of 7,500 to be taken on the islands for the subsistence and the care of the natives) and will promptly use its best efforts to ensure the observance of this prohibition by United States citizens and vessels.

(3) Every vessel or person offending against this prohibition in the said waters of Behring Sea outside of the ordinary territorial limits of the United States, may be seized and detained by the naval or other duly commissioned officers of either of the high contracting parties but they shall be handed over as soon as practicable to the authorities of the nation to which they respectively belong, who shall alone have jurisdiction to try the offense and impose the penalties for the same. The witnesses and proofs necessary to establish the offense shall also be sent with them.

(4) In order to facilitate such proper enquiries as Her Majesty's Government may desire to make, with a view to the presentation of the case of the Government before arbitrators, and in expectation that an agreement for arbitration may be arrived at, it is agreed that suitable persons designated by Great Britain will be permitted at any time, upon application, to visit or to remain upon the seal islands during the present sealing [19] season for that purpose.

Signed and sealed in duplicate at Washington, this fifteenth day of June, 1891, on behalf of their respective governments, by William F. Wharton, Acting Secretary of State of the United States and Sir Julian Pauncefote, G. C. M. G., K. C. B., H. B. M. Envoy Extraordinary and Minister Plenipotentiary.

(Signed) WILLIAM F. WHARTON. (Seal)

(Signed) JULIAN PAUNCEFORTE. (Seal)

Now, therefore, be it known that I, Benjamin Harrison, President of the United States of America, have caused the said agreement to be observed and fulfilled with good faith by the United States of America and the citizens thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the City of Washington, this fifteenth day of June, in the year of our Lord, one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

(Signed) BENJAMIN HARRISON.

By the President:

WILLIAM F. WHARTON,

Acting Secretary of State."

PLAINTIFF'S EXHIBIT No. 5.

A certified copy of the smooth log book of the U. S. S. "Thetis" for June 29, 1891, on file in the Bureau of Navigation, Navy Department. Certified by T. Douglas Romain, Acting Secretary of the Navy. (Seal.)

"8:00 A. M. to Meridian * * * At 11:00 spread sails and made preparation for sea, sent Ensign W. L. Dodd to board the following vessels and to deliver the President's proclamation June 15, 1891, [20] and learn all warnings from the Commanding Officer in regard to seal hunting: 'George B. White,' Master, Justin Cheneworth; 'Mattie T. Dyer,' Master, C. E. Mockler; 'Venture,' Master,

John Worth; 'Bessie Rutter,' Master, Henry Olsen; 'Anna E. Point,' Master, Alfred Bennett; 'Henry Dennis,' Master, E. B. Miner; 'Emmet Felitz,' Master, F. L. Bangs.

(Signed) J. A. BELL,
Ensign, U. S. N."

PLAINTIFF'S EXHIBIT No. 6.

A photostatic copy of a map prepared by the defendant at the office of the U. S. Coast and Geodetic Survey from Official Reports in possession of the State Department of the defendant showing positions of sealing vessels seized or warned by the Government of the United States during the season of 1891. On this map there has been marked in red ink the place where the "Bessie Rutter" was warned on June 29th, 1891, by the U. S. S. "Thetis."

PLAINTIFF'S EXHIBIT No. 8.

A photostatic section of U. S. Hydrographic Chart No. 68 having marked thereon the area frequented by the fur seals in Bering Sea. And also the D'Ancona Letter as follows: From Senate Executive Document 177, 53d Congress, 2d Session. Fur Seal Arbitration, 1893, Vol. 2, Appendix 1.

"TREASURY DEPARTMENT,
Office of the Secretary.
Washington, D. C., March 12, 1881.

Sir: Your letter of the 19th ultimo requesting certain information in regard to the meaning placed by this Department upon the law regulating the killing of fur-bearing animals in the Terri-

tory of [21] Alaska was duly received. The law prohibits the killing of any fur-bearing animal, except as otherwise therein provided, within the limits of Alaska Territory, or in the waters thereof, and also prohibits the killing of any fur-seals on the islands of St. Paul and St. George or in the waters adjacent thereto, except during certain months.

You inquire in regard to the interpretation of the terms 'waters thereof' and 'waters adjacent thereto,' as used in the law, and how far the jurisdiction of the United States is to be understood as extending.

Presuming your enquiry to relate more especially to the waters of western Alaska, you are informed that the treaty with Russia of March 30, 1870, by which the Territory of Alaska was ceded to the United States, defines the boundary of the Territory so ceded. This treaty is found on pages 671 to 673 of the volume of treaties of the Revised Statutes. It will be seen therefrom that the limit of the cession extends from a line starting from the Arctic Ocean and running through Bering Strait to the north of St. Lawrence Islands. The line run thence in a southwesterly direction, so as to pass midway between the island of Attu and Copper Island of the Kromanboski couplet or group in the North Pacific Ocean, in meridian 193 degrees of west Longitude. All the waters within that boundary to the western end of the Aleutian Archipelago and chain of islands are considered as comprised within the waters of Alaska Territory.

(Deposition of A. G. Spexarth.)

All the penalties prescribed by law against the killing of fur-bearing animals would therefore attach against any violation of law within the limits before described.

Very respectfully,
(Signed) H. F. FRENCH,
Acting Secretary.

Mr. D. A. ANCONA,
No. 717 O'Farrell Street, San Francisco, Cal."

[22]

DEPOSITION OF A. G. SPEXARTH, FOR PLAINTIFF.

The deposition of A. G. SPEXARTH, taken on the 9th day of April, 1925, on behalf of plaintiff, for use in this case was read in evidence.

Direct Examination.

My name is A. G. Spexarth and I reside at Astoria, Oregon. I am an American citizen. I was living at Astoria in 1891. I was connected with the plaintiff, the Pacific Hunting & Fishing Company, an Oregon corporation. It was organized under the laws of the State of Oregon for the purpose of seal-hunting in the Bering Sea.

In 1891 this company owned a schooner called the "Bessie Rutter," about 35 tons. Our company built the schooner for sealing On March 17th she cleared from the port of Astoria on a fur-sealing expedition bound for Bering Sea. Her master was Henry Olsen and I instructed him that he was to

(Deposition of A. G. Spexarth.)

go sealing in Bering Sea. There were 14 in the crew and she carried four hunting boats and was provided and equipped for a voyage of from eight to ten months. Four of the crew were good hunters.

"Q. Of course you have no knowledge yourself as to whether they got into Bering Sea or not?

A. No.

Q. Do you remember when she returned into port?

A. She returned in the late summer—in July."

At that time I owned a one-quarter interest in the Pacific Hunting & Fishing Company. The other stockholders were the Captain, Henry Olsen, Sam Freeman, Theodore Bracker. Myself and Sam Freeman of Hood River are the only ones now living and all of [23] them were American citizens. At the present time I am president of the Pacific Hunting & Fishing Company.

"The charter of this company lapsed some years ago and was restored by the State of Oregon, and is now in existence just as it was before."

Its principal place of business is in Astoria, Oregon.

"Q. Do you know whether the 'Bessie Rutter' made any catch in 1891 other than the coast catch of fur seals? A. No.

Q. She did not get into the Bering Sea?

A. No, not at all."

(Deposition of A. G. Spexarth.)

Cross-examination.

I was born in Germany and naturalized and admitted to citizenship in the United States Courts in Portland, Oregon, in 1873. Judge Deady was the Presiding Judge. The corporation is a stock corporation and was incorporated in 1891. There were 100 shares at $20 a share and all was paid for. I owned a one-quarter interest.

"Q. When did this vessel first enter commerce?

A. Entered the fishing enterprise in 1891. Many of these dates I have in mind because of fires and different things; cannery wrecks and such things as these; I have them in mind, but confuse the dates.

Q. I don't want to confuse you at all, Mr. Spexarth, but I would like to know whether you meant 1871 or 1891? A. Not 1871; I meant 1891.

Q. In 1891 was the date of the incorporation of this company? A. Yes, sir.

Q. And 1891 was also the date of the building of this vessel? A. Yes, sir.

Q. And the $10,000 paid into the capital you referred to, was this wholly for the construction of this vessel and her equipment? A. Yes, sir.

Q. And fitting her out?

A. Yes, fitting her out for sea.

Q. With stores and everything for hunting and fishing voyage; is that true? A. Yes, sir. * * *

Q. Do I understand that the schooner 'Bessie Rutter' which is the vessel you constructed, left As-

(Deposition of A. G. Spexarth.)

toria in the spring of 1891 for a hunting and sealing voyage? A. Yes, for hunting and sealing.

Q. And that she carried four hunting boats and had 14 men? A. Yes, sir.

Q. And of these men four were hunters?

A. Four hunters, yes." [24]

The company owned no other property except this vessel. It was a $10,000 corporation and the money was paid out for the building of the vessel and fitting her out for sea with stores and everything for a hunting and fishing voyage.

The "Bessie Rutter" left Astoria in the spring of 1891 for a hunting and fishing voyage. She carried four hunting boats and had 14 men, four of whom were hunters.

"Q. Now, in the spring of 1891 when this vessel left port, how were you connected with the company other than as a stockholder?

A. In no other way except that I furnished the supplies. That was a private affair.

Q. Were you managing the vessel?

A. I was managing the vessel on shore, but I was not aboard.

Q. Did you issue instructions to the master as to where he was to go and what he was to do?

A. Yes, sir.

Q. Was that part of your shore management?

A. Yes, sir.

Q. Just what did you instruct the captain to do?

A. The captain was instructed to proceed to the Bering Sea and had all the things that were

(Deposition of A. G. Spexarth.)

necessary to prosecute the voyage; also some minute instructions were given as to the use of the fishing nets that were put aboard—to catch seal with the net.

Q. Have you the log of that vessel?

A. No, that was all destroyed.

Q. Then you personally do not know whether the master carried out your orders or not, do you?

A. Well, I think I do because—

Q. Only as to what he told you?

A. Only what he told me, and that he returned before the end of the voyage.

Q. You did not go on the voyage yourself?

A. No. I never was on a sealer.

Q. The vessel returned in the late summer, I believe you said? A. Yes, in the late summer.

Q. Did she make a report to the custom-house of her catch? A. Yes, sir.

Q. In whose name as owner was this vessel documented?

A. Myself as managing owner. The other stockholders were American citizens."

Redirect Examination by Mr. NORTH.

At the time the "Bessie Rutter" was fitted out for the voyage I was president of the corporation. This vessel was originally owned by private ownership. Mr. Freeman was an American citizen and the others were naturalized citizens.

At the time of the interference with the voyage of the [25] "Bessie Rutter" of 1891 the stock-

(Deposition of A. G. Spexarth.)

holders of Pacific Hunting & Fishing Company were Henry Olsen, 62 shares; A. G. Spexarth, 93 shares; Samuel Freeman, 62 shares, and Theodore Bracker, 186 shares; and also, Theodore Bracker had acquired at that time 93 shares from William Olsen.

Recross-examination by Mr. MAYTHAM.

Question: Was this vessel ever engaged in any other work than in sealing and hunting?

Answer: No, sir; the vessel was not suitable for any other trade; it was only 35 ton.

DEPOSITION OF A. G. SPEXARTH, FOR PLAINTIFF.

Deposition of A. G. SPEXARTH, a witness on behalf of plaintiff taken on the 13th day of July, 1926, and read in evidence by the plaintiff.

In the City Court of Astoria, Oregon.

Direct Examination by Mr. H. H. NORTH, Attorney for Plaintiff.

I am the same Mr. Spexarth whose deposition was taken in San Francisco about a year ago. I reside in Astoria and have lived there better than sixty years. In 1891 Henry Olsen was master of the schooner "Bessie Rutter" and was also a stockholder in the Pacific Hunting & Fishing Company, an Oregon corporation, which owned the "Bessie Rutter." The crew of the "Bessie Rutter" in 1891 were employed on a lay. The hunters and master

(Deposition of A. G. Spexarth.)

were all employed on a lay. Their pay was to be determined on the number of seals taken.

Cross-examination.

The crew were to be paid by the number of skins which they took. They were also to be paid wages exclusive of the lay, the amount of $35 a month irrespective of their catch and per cent of the valuation of their catch. Mr. Olsen, the master, owned 93 or 94 shares. [26]

Plaintiff then introduced the testimony of FREDERICK G. DODGE given in the case of Littlejohn, etc., et al., vs. United States of America, Nos. 17,559 and 17,560, for use in all pending cases, as follows:

TESTIMONY OF FREDERICK G. DODGE, FOR PLAINTIFF.

"I am Captain of the United States Coast Guard Commanding the Southern Division of the Coast Guard with Headquarters in San Francisco, and Captain of the Port of San Francisco. I entered the Revenue Marine Service on the 21st of May, 1887.

As Coast Guard Officer I have passed twenty-three seasons in the Bering Sea and Arctic Ocean for the Government. I made my first cruise on the Northwest Coast in 1890 on the 'Corwin.' In 1891 I was on patrol duty on the Coast Guard Cutter 'Rush' in the Bering Sea, cruising along the coast of Southeastern Alaska, the Aleutian

(Testimony of Frederick G. Dodge.)

Islands, Bering Sea, and patrolling around the Pribilof Islands. I had the same assignment in 1892 with the exception of the latter part, when I was transferred to the 'Corwin' and cruised around and remained in Bering Sea taking the depositions of natives as to the time that seals left the Seal Islands and went through the passes into the Pacific. I was up there until November of that year on the 'Corwin.' In 1893 I was cruising on the 'Bear' in Bering Sea and the Arctic Ocean. In 1894 I was on the 'Bear' in the Arctic Ocean and the Bering Sea. I was on the Bering Sea Patrol and also cruised up as far as Point Barrow in the Arctic.

Our primary duty on these patrols was the enforcement of the regulations in regard to fur seal fishing and carrying out the provisions of the Modus Vivendi. My other cruises have been made between 1894 and 1922. In the last year I was in command of the Fleet there—the whole Patrol Fleet with headquarters at Unalaska. I was transferred to San Francisco in 1926, having prior to that [27] been in charge of the Northern Division at Seattle for five years. This assignment included the coast of Oregon, Washington and Alaska and all the ships on the coast—all the Patrol Fleet that went to Alaska. I gave the sailing orders for the patrol of the Bering Sea herd during those five years.

One of my duties in 1891 and 1892 was to keep track of the seals; note where we saw seals in the

(Testimony of Frederick G. Dodge.)

Bering Sea and North Pacific and enter it on a chart, and to gather statistics and facts for the Arbitration Board which was to meet in Paris to arbitrate the seal question. The sealing chart which formed one of the exhibits for the International Arbitration Commission for 1891 was compiled from the data furnished by our patrol ships.

Also one of the primary duties for a Coast Guard officer is the enforcement of all navigation, customs and revenue laws. He studies this law for two years at the Academy and is examined on revenue, navigation and customs laws, etc., at every examination before he is qualified for promotion.

The first duty of a boarding officer engaged in the Bering Sea Patrol was to ask for the ship's papers. We examined the ship's papers to see if she was properly documented, had cleared from the custom-house; whether she was under a license, enrollment and license, or whether she was registered for a whaling voyage. And if her papers were all right we carried out our further duties in regard to the vessel. The ship's papers were the first thing examined. There was no litigation as to the voyage of a registered ship. A vessel under enrollment and license could be employed in the coasting trade or fisheries—that is anywhere along the coast of the United States in domestic waters of all kinds. The only thing that she would be excluded from engaging in would be foreign trade. Fur seal hunting is classed [28] as 'coasting trade.'

(Testimony of Frederick G. Dodge.)

Usually it blows harder to the southward of the Aleutian Islands after the first of July than it does in the Bering Sea. Hunting is done to the southward until about the first of July and after that in Bering Sea. All the fur seals are in Bering Sea after the first of July. The season lasts there until the middle of September. It is much better from the 1st of July until the middle of September in the Bering Sea than to the southward—that is, south of the Aleutian Islands. During those months the wind is to the northward but a great deal of calm during July and August in Bering Sea.

There are always at least two vessels patrolling outside of the Bering Sea up to the first of July and by that time the seals are all in Bering Sea and around the Pribilof Islands. There are no seals in commercial quantities to the south of the Aleutian Islands after the 1st of July. After this all the vessels went into the Bering Sea. We used to patrol the zone, taking the Pribilof Islands and circling around there 200 miles. The vessels would patrol in sectors.

After the first of July there is no place in the North Pacific Ocean where a pelagic sealer could successfully hunt for seals except in the neighborhood of the Pribilof Islands. I never saw a seal in the North Pacific Ocean southward of the Aleutian Islands after the first of July until along in October and November and I had much experience.

"Miss PHILLIPS.—I think I will object to

(Testimony of Frederick G. Dodge.)

that. I think the Captain has just stated that after the 1st he was never south of the Aleutian Islands—after the 1st of July.

"The COURT.—He said he never saw a seal.

"A. I never saw a seal there. I have been south a great many times because sometimes during the middle [29] of the season I might be detailed, as I was two years on the 'Manning' to take prisoners up to Valdez, and came out to the southward and cruised around there, and be gone nearly a month on that cruise, and occasionally go to the southward and go up as far as Seward.

"Miss PHILLIPS.—Q. Was this during the period you have referred to, during 1891 and 1892, that you took prisoners to Valdez?

"A. No, that was subsequent. I only say that I have been to the southward. I never observed a seal to the southward of the islands after the 1st of July, but during those years we did all our cruising up in the Bering Sea and around the Pribilof Islands. * * *

"Mr. NORTH.—Q. Are you familiar with the conditions about the Commandorsky Islands, the Russian Group?

"A. Only by hearsay. I have seen vessels over there as late as 1922 when I was in command of the fleet; I sent one of our vessels over there to investigate.

"Q. Do you know whether at this time, that is, during these years 1886 to 1893, inclusive, a block-

(Testimony of Frederick G. Dodge.)

ade was maintained by the Russians about that group of islands?

"A. I know they had a patrol there, Russian gunboats were patrolling the Commandorsky Islands in 1891, 1892, 1893 and 1894, and our sealing vessels would not go there unless it was the last resort; if they were driven out of Bering Sea they might take a chance, but all vessels that were found there by the Russians, according to the report which came, which was authentic, although I never saw it, the vessels were sunk and the crews sent to Siberia; they did not fool with them at all over there. * * *

"Q. You spoke about the Copper Islands. You are not familiar with them; you have not been there yourself, but you knew there was a Russian patrol there in 1891, 1892, 1893 and 1894. Have you any idea how many vessels were in that patrol?

"A. There were two vessels.

"Q. Do you know how far out they went from Copper Islands? A. No.

"Q. You would not expect them to be as far as from the Pribilof Islands with two vessels?

"A. My only information was they patrolled over there from 30 to 40 miles offshore." [30]

according to the report, which came and which was authentic, the vessels were sunk and the crew sent to Siberia. They didn't fool at all with them further."

TESTIMONY OF GEORGE G. WESTER, FOR PLAINTIFFS.

Plaintiff then introduced the testimony of GEORGE G. WESTER called for plaintiffs in the Ladd case, No. 17,433, vs. the United States, as follows:

"I was engaged in the sealing business for twelve years from 1887 to 1898, inclusive. I know the habits of the seals and where they are found at the different seasons of the year. They haul out on the Pribilof Islands in the months of July and August to and including the middle of September, and are then to be found principally to the east, south and west of the Pribilof Islands, and may be found in profitable numbers for hunting not much farther south than sixty or seventy-five miles from the islands.

Along the Japanese coast the hunting of seals ceases to be profitable about the first of June, when they leave there and follow up the coast until they get home to their rookeries on Kormandorski Islands.

There is no profitable fur seal hunting south of the Aleutian Islands after the first of July, so far as I know. We used to figure on twenty days—from fifteen to twenty days, having an ordinary sealing vessel and ordinary weather, to go from Hakodate to the sealing grounds adjacent to the Pribilof Islands in the month of June."

(Testimony of George G. Wester.)

On cross-examination by Mr. MAYTHAM, he testified as follows:

"These vessels were all of different sizes, but did not differ materially in their sailing qualities. I would not expect a vessel of 25 tons to complete the voyage as quickly as a vessel [31] of 100 tons. There is some difference as to time according to size in a vessel making a voyage.

I spent the season in the Bering Sea in the neighborhood of the Pribilof Islands in 1887 from July 4 until we were seized—I don't remember just what date that was.

I spent the full season near the Pribilof Islands in 1888 on the vessel 'Rosie Olsen'; also the full season of 1889; we were not warned. I do not remember how many seals we got as we were not near enough to the sealing grounds.

In 1889 I was on the 'Mary and Ellen' and was not seized or warned that year. My own catch was nearly seven hundred seals; the catch of the vessel was over two thousand—something like two thousand six hundred or two thousand seven hundred. I saw no warning vessels that year in the Bering Sea.

In 1894 I was in the Bering Sea from the first of August until the 15th of September. The only full seasons that I was in the Bering Sea were 1888 and 1889.

I consider myself qualified to state what were the sealing grounds for the years 1887 to 1893."

(Testimony of George G. Wester.)

On redirect examination he testified:

"There were other years that I was in Bering Sea. After 1894 the Government permitted sealing with spears outside of a certain zone, from the first of August on.

I was there for such periods of time in the years 1894, 1895, 1896 and 1897."

Plaintiff then rested. Whereupon defendant introduced the following documentary evidence, to wit. [32]

DEFENDANT'S EXHIBIT No. 1.

Coastwise Vessels Cleared. Date, 1891, March 17; Rig, Sch. Name: Bessie Rutter; Destination, San Point, Alaska; No. of tons, 30; Master, Olsen. Coastwise Vessels Entered. Date, 1891, July 20th; Rig., Sch.; Name, Bessie Rutter; Where from, Sand Point, Alaska; No. of tons, 30; Master, Olsen.

"I certify that the above are true and correct copies of the record of clearance and entry of the schooner Bessie Rutter, as taken from Volume 7 of the record of entries and clearance coastwise at the port of Astoria, Oregon on the dates above given.

Customhouse Astoria, Oregon, Aug. 23rd, 1928.

[Seal] (Signed) R. D. LAMB,
Deputy Collector in Charge."

[Endorsed]: U. S. District Court, No. 17,341. Defendant's Exhibit No. 1. Filed 9/18/28. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk.

DEFENDANT'S EXHIBIT No. 2.

Coasting Manifest. Manifest of the cargo laden on board the Sch. Bessie Rutter, whereof H. Olsen is master; burden 30.33 tons, bound from Astoria, Oregon, for Sand Point, Alaska, Mar. 17, 1891. Packages and contents: 4 breech loading shotguns; 4 rifles; 30,000 wads; 21,000 primers; 6 kegs powder; 1 keg blasting powder; 21 sks. shot.

"Customhouse, Astoria, Oregon, Mar. 17, 1891.

This certifies that a bond has been taken in the sum of one thousand dollars to protect the United States regarding the violation of the laws governing trade with Alaska.

[Seal] (Signed) F. L. PARKER,
Dep. Collector." [33]

"COASTWISE CLEARANCE PERMIT.

Customhouse, Port of Astoria, Mar. 17, 1891.

Henry Olsen, Master of the Sch. Bessie Rutter of Astoria, Oregon, having sworn as the law directs, to the within manifest, consisting of sundry articles of entry, and delivered a duplicate thereof, permission is hereby granted to the said vessel to proceed to the port of Sand Point, in the Terry. of Alaska.

Given under our hands at Astoria, Oregon, the day and year above mentioned.

[Seal] (Signed) F. L. PARKER,
Dep. Collector."

[Endorsed]: 30. Olsen. Coasting Manifest Sch. Bessie Rutter for Sand Point, Alaska. Mar.

17, 1891. U. S. District Court, No. 17341. Defts. Exhibit No. 2. Filed 9/18/28. Walter B. Maling, Clerk, by A. C. Aurich, Deputy Clerk.

DEFENDANT'S EXHIBIT No. 3.

COASTING MANIFEST.

Gardner & Thornley
Ship and Custom Brokers
322 Washington Street

Manifest of the whole cargo on board the Schooner Bessie Rutter; Henry Olsen is master, burden 30.33 tons, bound from Astoria, Oregon, for Sand Point, Alaska, June 30th, 1891. Packages and contents: 4 breech loading shotguns; 4 rifles; 30,000 wads; 21,000 primers; 6 kegs of powder; 1 keg blasting powder; 21 sks. of shot; stores and ballast; 207 sealskins.

"This certifies that a bond has been taken in the sum of one thousand dollars to protect the United States regarding the violation of the laws governing trade with Alaska. [34]

Henry Olsen, Master (or commander) of the schooner called the Bessie Rutter of Astoria, Oregon, do swear (or affirm) to the truth of this manifest, and that to my best knowledge and belief all the goods, stores and merchandise of foreign growth or manufacture, therein contained, were legally imported, and the duties thereupon have been paid or secured according to law.

(Signed) HENRY OLSEN.

Sworn to before me, this thirtieth day of June, 1891.

(Signed) C. H. BULLARD,
Deputy Collector.

Port of Sand Point,
District of Alaska, July 1st, 1891.

Henry Olsen, Master of the schooner Bessie Rutter of Astoria, Oregon, having sworn as the law directs to the within manifest consisting of the sundry articles of entry and delivered a duplicate thereof, permission is hereby granted to the said vessel to proceed to the port of Yokohama in the State of Japan.

Given under my hand at — the date and year above mentioned.

(Signed) C. H. BULLARD,
Deputy Collector.

District and Port of ——

OATH OF MASTER TO MANIFEST ON ENTERING COASTWISE.

Henry Olsen, Master of the vessel called the Sch. Bessie Rutter, of Astoria, do swear that the manifest which I now exhibit contains a true account of the articles composing the whole cargo of the said Sch. which now are or at any time have been on board the said Sch. from the time of her departure from the port of Sand Point, A. T., from whence she first sailed, except —— and that no part thereof has been landed therefrom excepting ——.

(Signed) HENRY OLSEN,
Port of Astoria, Oregon.

Sworn and subscribed before me this 20 day of July, 1891.

(Signed) F. L. PARKER,
Dep. Collector." [35]

[Endorsed]: "30. Olsen. Coasting Manifest. Schooner 'Bessie Rutter.' Owner, Olsen,—Master. From Sand Point, A. T., Jul. 20, 1891. U. S. District Court, No. 17,341. Defts. Exhibit No. 3. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. Gardner & Thornley, Ship and Custom-house Brokers, 322 Washington St., San Francisco, Cal."

Request will be made by defendant for transfer to the Circuit Court of Appeals for the Ninth Circuit, the foregoing exhibits introduced in evidence by the defendant, pursuant to the rules of court.

Thereupon plaintiff called to the stand and offered in rebuttal the following testimony, to wit: [36]

TESTIMONY OF FREDERICK G. DODGE, FOR PLAINTIFF (RECALLED IN REBUTTAL).

FREDERICK G. DODGE, a witness called for the plaintiff.

Question: Captain Dodge, what was your occupation from 1887 to 1927?

Answer: In 1887 I entered the Coast Guard Service as a cadet, and in 1927, I resigned as a Commodore in the Coast Guard Service.

(Testimony of Frederick G. Dodge.)

Q. Is it a part of the duty of the Coast Guard officers to examine ship's papers?

A. That is one of their primary duties. A coast guard officer is also an inspector of customs and he has the same authority as a collector of customs.

Q. When you were at the cadet school did you make a study of the navigation laws of the United States?

A. That was one of our primary duties, to study the navigation laws and ship's papers of all kinds; a coast guard officer is supposed to be an expert on those things.

Q. What would be the significance of a schooner, sailing schooner, clearing from Astoria for Sand Point, Alaska, the vessel being a registered vessel?

A. That would signify that Sand Point, Alaska, would be her first point of call; she would touch there first after leaving Astoria; if the vessel was going to proceed from there she would clear from there for another port wherever she chose to go and obtain clearance papers there.

The COURT.—In other words, it is put under a legal obligation to go to the port to which it has cleared?

A. To which it has cleared.

Q. Having accomplished that it is under no obligations to go to any particular place?

A. No; after that when she arrives at that port the law compels her to enter the vessel there, and if he does not report to the collector of customs her arrival there inside of 24 hours she is [37]

(Testimony of Frederick G. Dodge.)

subject to a fine; if he is trading he may obtain cargo there or the next port. Or, he may go to another cargo port. Or, he may go whaling or hunting.

Q. Is there any other significance than that Sand Point was their first point of touching?

A. Only that she cleared for that point and he would be under the duty of going to that port and presenting her clearance or ship papers.

Cross-examination.

Question: Referring to the ordinary way of clearing these sealing vessels back in the 80's and '90's, have you ever examined the custom-house records here at San Francisco to see how vessels cleared?

Answer: No; I have only examined papers on board ships.

Q. You never examined the customs-house record of any sealing vessels?

A. I have examined papers on board the vessels, their registers and their enrollings and the license, if any, to carry on a fishing and whaling trade.

"Q. A vessel clearing in those times usually carried ship's documents, either her register, or her enrollment, or license? A. Yes.

Q. That is all she would have?

A. No, if she was a registered vessel we also looked at her crew list, and mustered the crew, and compared it with the crew list, and if she was engaged in trade we examined her manifest, and certi-

(Testimony of Frederick G. Dodge.)

fied to the manifest. That is one of the duties of a Coast Guard officer.

Q. That is when she enters port?

A. No, not when she enters port; when she enters a port she takes that to the customs authorities. We board them outside; any vessel, foreign or American, can be boarded within twelve miles, three marine leagues of the United States, by a Coast Guard officer, and her papers examined and certified to, and one of his duties is to examine the manifest and certify to the manifest, and if in a foreign trade, if under a register, to muster the crew and examine the crew list, and see if they correspond, within twelve miles of our coast. [38]

Q. That is when a vessel is coming in with the possibility that she might be bringing in cargo, smuggling, that is part of your duty? A. Yes.

Q. At that time you would examine—if she was under enrollment you would look at whether she was enrolled? A. That is all.

Q. If she was a registered vessel and might possibly have come from a foreign port, then you would see what cargo she had?

A. Then we would examine the manifest thoroughly and we would have to certify to it.

Q. Such a thing as examining other papers that the ship may have is not part of your duties, is it?

A. We only examine the ship's license if she is in the coasting trade, trading in one great district—if she is going from one great district to another great district she is licensed, and enrolled—over

(Testimony of Frederick G. Dodge.)

twenty tons, we examine those, and the manifest and crew list, and those are all the papers we examine, unless it is a steamer, when we examine to see if the officers hold their license."

Q. The sealing business up there, was there any distinction made particularly as to the privilege of a vessel that was enrolled, a vessel that was registered, and the vessel that was licensed in the coasting trade? A. None whatever.

Q. That is, vessels that were up there, could do any one of those things whatever her papers were?

A. Any one of them, as long as the papers were all right. If she had papers under registry she could engage in sealing if she was under enrollment or under license 20 tons.

"Q. A vessel could go out on the high seas and do as she pleased and come back to this country without touching at any other customs port up there, couldn't she?

A. Well, she could not go out on the high seas and do as she pleased; she could go out on the high seas and do anything within the law.

Q. I understand that; I do not mean she could go out on the high seas and commit piracy; I mean a vessel going out, after she had entered a port, she could go out and do as she pleased on the high seas, provided she was within the law, without coming back to any other port, couldn't she—coming back to San Francisco, or any other port? A. Yes.

Q. She did not have to touch at any other port?

A. She did not have to touch at any other port

(Testimony of Frederick G. Dodge.)

after she cleared for whatever she was doing up in Alaska, but if she went into Bering Sea, she had to enter there, there was a custom-house there. [39]

Q. I just asked you about being on the high seas. Now you are talking about going into some port in Alaska.

A. If she did not enter a port where there was a custom-house, she did not have to enter and clear; she went on with her business the whole season, whatever it was.

Q. A vessel going from San Francisco, or any of these coast ports, going to fish on the high seas, did not have to go into any port, did she? A. No.

Q. She could go out on the high seas and come back without entering any other port: Isn't that true? A. Yes.

Q. It does not matter whether she was enrolled, or registered, or licensed, does it? A. No."

Redirect Examination by Mr. NORTH.

Mr. NORTH.—Question: I will show you these exhibits 1, 2 and 3 of the United States, and ask you to examine them, Captain.

A. That is a manifest of the schooner's cargo, bound from Astoria to Sand Point; that is a clearance, and this is a coasting manifest.

Q. Do you observe anything on these papers that would show anything except the intention to stop at Sand Point after leaving Astoria, Oregon?

A. Yes, there is a manifest here that shows she had guns and rifles, primers, powder, etc.; there is

(Testimony of Frederick G. Dodge.)

nothing on that coastwise manifest that would indicate that she was doing anything except going on a hunting voyage, I should say.

Q. Isn't it a fact that the majority of the registered vessels that came under your inspection simply cleared for hunting and fishing?

A. Most of them engaged in fishing cleared for hunting and fishing.

Q. But this (showing plaintiff's exhibit, the clearance for Sand Point) would be a perfectly proper paper for a vessel that was intending to hunt seal in the Bering Sea? A. Yes, sir. [40]

From my observations during many years vessels that cared to hunt in Bering Sea simply cleared for hunting and fishing without stating their destination, some cleared for the coasting trade. If a vessel goes out from one port intending to stay out on the high seas for hunting and fishing, she does not have to enter a port at all. The seal fisheries at that time in Bering Sea were out on the high seas, so most of the vessels that would sail for hunting and fishing would not state their destination."

Both sides rested.

Plaintiff moved for judgment on the ground that the material allegations of its complaint were established by uncontradicted evidence.

"Miss PHILLIPS.—I move for judgment for defendant on the ground that the weight of the evidence shows by evidence that is not contradicted, that this vessel was not engaged in a voyage to

Bering Sea, and I would like to argue this and perhaps brief it."

Both parties requested special findings.

The case was duly submitted on briefs.

Monday, October 29, 1928—July Term, 1928—
Before LOUDERBACK, J.

(Title of Court and Cause.)

MINUTES OF COURT—OCTOBER 29, 1928—
ORDER DIRECTING ENTRY OF JUDGMENT.

This cause heretofore tried and submitted, being now fully considered, it is ordered that judgment be entered herein in favor of defendant on findings to be filed.

Thereafter the Court made the following order:

(Title of Court and Cause—No. 17,341.)

ORDER OF COURT STAYING PROCEEDINGS, ETC.

Good cause appearing therefor, and in order to give plaintiff above named an opportunity to produce additional evidence herein without loss of any rights;

IT IS HEREBY ORDERED, That plaintiff above named may have to and including the 8th day of December, 1928, within which to [41] move to set aside the judgment rendered in the above-entitled cause, and/or to serve amendments to defendant's proposed findings of fact, and/or to prepare a

bill of exceptions to use on a motion for a new trial herein, and/or for the purpose of taking an appeal from the judgment herein, and/or for the introduction of additional testimony in behalf of the plaintiff above named, provided the Court on showing deems it proper to open the cause for such purpose.

Dated: This 31st day of October, 1928.

HAROLD LOUDERBACK,
District Judge.

[Endorsed]: Filed Oct. 31, 1928. [42]

Subsequently proceedings were duly stayed until the final determination of the petition for rehearing.

(Title of Court and Cause—No. 17,341.)

PETITION FOR REHEARING.

To the Honorable District Court of the United States for the Northern District of California, Southern Division:

The plaintiff in the above-entitled cause hereby petitions the Court for an order vacating and setting aside of the decision dated October 29, 1928, for judgment for defendant on findings to be filed against the plaintiff in said cause.

And further petitions for an order setting aside the order of submission in the above-entitled cause and for leave to introduce in evidence the depositions of A. G. Spexarth and of Sam Freeman, witnesses on behalf of the plaintiff, taken at Portland, Oregon, on November 16, 1928, pursuant to stipu-

lation of counsel for use in the trial of the above-entitled action.

The motion will be made upon the ground of:

(1) Accident or surprise which ordinary prudence could not have guarded against.

(2) Insufficiency of the evidence to justify the decision.

(3) In the exercise of a sound judicial discretion requiring the opening of the case for further testimony in order to avoid a miscarriage of justice.

Said petition for a rehearing is to be made upon the pleadings and papers on file in said cause, upon the minutes of the Court, and upon all the testimony in the record, and also upon the depositions of the said A. G. Spexarth and Sam Freeman, taken at Portland, Oregon, on November 16, 1928, as aforesaid.

The petitioner specifies that plaintiff was taken by surprise [43] by the introduction of Defendant's Exhibits Nos. 1, 2 and 3. Further specifies that the evidence is insufficient,

(a) To sustain the decision that the owners of the schooner "Bessie Rutter" did not intend said schooner to hunt seal in the Bering Sea during the year involved in said cause.

(b) To sustain the decision that said vessel had not undertaken a voyage to Bering Sea during the year 1891.

(c) To sustain the decision that the voyage was not interrupted or interfered with by the defendant.

(d) To sustain the decision that the owners of

the said schooner were not damaged by any act of the defendant during said year in connection with the said voyage.

(e) To sustain the decision that the original builders of the schooner "Bessie Rutter" were not in the whole, or in part, the same individuals who composed the stockholders of the corporation Pacific Hunting and Fishing Company.

WHEREFORE plaintiff prays that the Court vacate and set aside its decision herein and reopen the case for the purpose of admitting the said depositions of Spexarth and Freeman as of November 16, 1928, and for such other orders in the premises as may be meet and just to the end that substantial justice be granted herein.

J. N. GILLETT and
H. H. NORTH,
Attorneys for Plaintiff.

[Endorsed]: Service and receipt of copy admitted Dec. 10, 1928.

GEO. J. HATFIELD.

Filed Dec. 10, 1928. [44]

(Title of Court and Cause—No. 17,341.)

NOTICE OF MOTION FOR REHEARING.

To the Above-named Defendant, and to Honorable GEO. J. HATFIELD, United States Attorney, Defendant's Attorney:

You, and each of you, please take notice that on Wednesday, the 19th day of December, 1928, at the hour of 10 A. M., or as soon thereafter as

the matter can be heard, the plaintiff will move his Honor Judge Harold Louderback, in his courtroom, Postoffice Building, Seventh and Mission Streets, San Francisco, for an order vacating the order for judgment for defendant on findings to be filed, made and entered October 29, 1928, for an order granting a rehearing to the plaintiff above named and for such other order or orders as may be meet and just.

Said motion will be based on the files, records and transcript of testimony taken in this suit, and upon the depositions of A. G. Spexarth and Sam Freeman, taken pursuant to stipulation of counsel, at Portland, Oregon, on November 16, 1928, and upon the further grounds of accident or surprise which ordinary prudence could not have guarded against, of insufficiency of the evidence to support the findings against the plaintiff, and in the exercise of a sound judicial discretion to hear further testimony in order to prevent a possible miscarriage of justice.

Dated: This 10th day of December, 1928.

J. N. GILLETT,
H. H. NORTH,
Attorneys for Plaintiff.

[Endorsed]: Service and receipt of copy admitted this 10 day of Dec., 1928.

GEO. J. HATFIELD.

Filed Dec. 10, 1928. [45]

Thereafter and on the 22d day of December, 1928, said petition for rehearing came on for hear-

ing. The plaintiff offered in evidence the depositions of A. G. Spexarth and of Sam Freeman, taken November 16, 1928. The defendant objected to the introduction of them in evidence on the ground that no showing was made of accident or of surprise, nor to explain why said evidence had not been discovered earlier. The matter was argued and submitted on briefs. On January 10, 1929, the Court sustained the objection and made an order refusing to allow said depositions to be received in evidence and denying plaintiff's petition for rehearing. [46]

Saturday, December 22, 1928—November Term, 1928—Before LOUDERBACK, J.

(Title of Court and Cause.)

MINUTES OF COURT—DECEMBER 22, 1928—ORDER SUBMITTING PETITION FOR REHEARING AND STAYING PROCEEDINGS.

ORDERED that petition for rehearing stands submitted on briefs to be filed in ten, five and five days. FURTHER ORDERED that all proceedings herein be stayed pending the hearing of this motion.

Thursday, January 10, 1929—November Term, 1928—Before LOUDERBACK, J.

(Title of Court and Cause.)

MINUTES OF COURT—JANUARY 10, 1929—ORDER DENYING PETITION FOR REHEARING.

Plaintiff's petition for rehearing heretofore argued and submitted, being now fully considered, IT IS ORDERED that said petition for rehearing be, and the same is, hereby denied.

(Title of Court and Cause—No. 17,341.)

ORDER ALLOWING EXCEPTION.

Motion of plaintiff heretofore herein made asking that the judgment be set aside and for the privilege of offering additional evidence being duly considered is denied and plaintiff having duly excepted to said ruling of Court, said exception is hereby allowed.

Dated: January 12th, 1929.

HAROLD LOUDERBACK,
District Judge.

[Endorsed]: Filed Jan. 12, 1929.

The defendant thereafter proposed special findings. They were identical with those approved, adopted and signed by the Court and which otherwise appear in the record. The plaintiff proposed amendments to defendant's proposed findings as follows:

(Title of Court and Cause—No. 17,341.)

PLAINTIFF'S PROPOSED AMENDMENTS TO DEFENDANT'S DRAFT OF FINDINGS AND CONCLUSIONS OF LAW.

I.

In the year 1891 the American schooner "Bessie Rutter," of [47] Astoria, Oregon, was owned and operated by the plaintiff, a duly incorporated corporation of the State of Oregon, with its principal place of business at Astoria, Oregon.

II.

On or about the 17th day of March, 1891, the plaintiff cleared said vessel for a voyage to hunt for fur seal in the North Pacific Ocean and Bering Sea and on June 29th, 1891, while on said voyage and near the Popoff Islands in the North Pacific Ocean, she was boarded by an officer of the United States vessel "Thetis," who acting upon the advice of and instructions from the defendant boarded the "Bessie Rutter" and then and there delivered to her master a warning against entering the waters of Bering Sea for the purpose of fur seal hunting on pain of the seizure and forfeiture of the said "Bessie Rutter" for so doing. That because of such warning and threats of seizure the master of the "Bessie Rutter" abandoned said sealing voyage into Bering Sea and returned to its home port, Astoria, Oregon, about July 20th, 1891.

III.

That because of said wrongful and unlawful interference with the said voyage of the said schooner "Bessie Rutter," the said plaintiff was damaged in the sum of $16,870.50.

CONCLUSIONS OF LAW.

As conclusions of law from the foregoing facts, the Court finds that the plaintiff is entitled to a judgment of this Court under the Act of Congress of June 7th, 1924, in the sum of $16,870.50.

Dated: January 12, 1929.

Rejected.

Exception allowed.

HAROLD LOUDERBACK.

[Endorsed]: Filed Jan. 12, 1929. [48]

(Title of Court and Cause—No. 17,341.)

EXCEPTIONS TO RULINGS OF COURT.

Now comes the plaintiff in the above-entitled action and excepts to the ruling of the Court in refusing to adopt findings Nos. II and III set forth in the findings of fact submitted to the said Court in pursuance to a ruling made by it on the ground that each of said findings being material facts in said action and having been established by the uncontradicted evidence.

Dated this 12th day of January, 1929.

J. N. GILLETT,
H. H. NORTH,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 12, 1929.

(Title of Court and Cause—No. 17,341.)

EXCEPTION TO FINDINGS OF FACT.

Now comes the plaintiff in the above-entitled action and remonstrates against and takes exception to the finding of facts filed in said action in paragraphs II and IV thereof on the grounds that the same are not warranted by or supported by any evidence in the case.

Dated this 12th day of January, 1929.

J. N. GILLETT,
H. H. NORTH,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 12, 1929.

(Title of Court and Cause—No. 17,341.)

ORDER ALLOWING EXCEPTION TO PLAINTIFF'S MOTION FOR JUDGMENT FOR PLAINTIFF DENIED.

Motion of plaintiff heretofore herein made asking for judgment in plaintiff's favor on the ground that plaintiff established [49] the material allegations of its complaint by uncontradicted evidence is denied, and plaintiff having duly excepted to said ruling of Court, said exception is hereby allowed.

Dated this 12th day of January, 1929.

HAROLD LOUDERBACK,
District Judge.

[Endorsed]: Filed Jan. 12, 1929.

The foregoing bill of exceptions contains all the evidence that was introduced and all the proceedings had on the trial of said cause EXCEPT evidence of ownership, heirship, and citizenship, found in plaintiff's favor, and evidence of stern-boat catch, etc., which are not material on the questions involved in this bill of exceptions.

And, now, within the time required by law and within the rules of this Court, plaintiff proposes the foregoing as, and for its bill of exceptions and prays that the same may be settled and allowed as correct.

J. N. GILLETT,
H. H. NORTH,
Attorneys for Plaintiff.

Approved this 11th day of February, 1929.

GEO. J. HATFIELD,
United States Attorney,
By ESTHER B. PHILLIPS,
Assistant U. S. Attorney,
Attorneys for Defendant.

Settled, approved and allowed this 11th day of February, 1929.

HAROLD LOUDERBACK,
District Judge.

[Endorsed]: Filed February 11th, 1929. [50]

(Title of Court and Cause—No. 17,341.)

NOTICE OF APPEAL.

To the Defendant Above Named, and to Honorable GEO. J. HATFIELD, United States Attorney, Attorney for Defendant:

You and each of you please take notice that Pacific Hunting & Fishing Company, etc., plaintiff in the above-entitled suit, hereby appeals from the final decree made and entered in the above-entitled cause on the 10th day of January, 1929, to the Circuit Court of Appeals for the Ninth Circuit.

Dated: This 14th day of February, 1929.

J. N. GILLETT,
H. H. NORTH,
Attorneys for Plaintiff.

Service of the above notice of appeal by copy admitted this 14th day of February, 1929.

GEORGE J. HATFIELD,
United States Attorney,
Attorney for Defendant.
By ESTHER B. PHILLIPS,
Asst. U. S. Attorney.

[Endorsed]: Filed Feb. 14th, 1929. [51]

(Title of Court and Cause—No. 17,341.)

PETITION FOR ALLOWANCE OF APPEAL AND ORDER THEREON.

The petition of the Pacific Hunting & Fishing

Company in the above-entitled cause shows that on January 10, 1929, judgment was entered in the above-entitled court in favor of defendant and against plaintiff, in which said cause certain errors are made to the prejudice of the plaintiff herein, all of which more fully appear from the assignment of errors presented herewith.

WHEREFORE, the plaintiff Pacific Hunting & Fishing Company prays that an appeal may be granted in its behalf to the Circuit Court of Appeals for the Ninth Circuit for the correction of the errors so complained of, and further, that a transcript of the record, proceedings, and papers in the said cause may be transmitted to the Circuit Court of Appeals for the Ninth Circuit; and further, that an order be made fixing the amount of security which plaintiff shall give and furnish upon said appeal, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said appeal by the United States Circuit Court of Appeals for the Ninth [52] Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Dated: This 14th day of February, 1929.

J. N. GILLETT,
H. H. NORTH,
Attorneys for Plaintiff.

ORDERED that the appeal petitioned for in the foregoing petition be and the same is hereby allowed upon said plaintiff filing with the Clerk of this court a good and sufficient bond in the sum of two hun-

dred (200) dollars, to the effect that if the said plaintiff above named shall prosecute the said appeal to effect and answer all damages and costs if plaintiff fails to make its complaint good, then said bond to be void, otherwise to remain in full force and virtue, the said bond to be approved by the Court, and it is ordered that all further proceedings in this court be, and the same are, hereby suspended and stayed until the determination of said appeal by the said United States Circuit Court of Appeals, and that said bond shall operate as a supersedeas bond.

Dated: This 14th day of February, 1929.

HAROLD LOUDERBACK,
District Judge.

Service and receipt of copy admitted this 14th day of Feb., 1929.

GEORGE J. HATFIELD,
U. S. Attorney.

[Endorsed]: Filed February 14th, 1929. [53]

(Title of Court and Cause—No. 17,341.)

ASSIGNMENT OF ERRORS.

Comes now the plaintiff above named, appearing by J. N. Gillett and H. H. North, its attorneys, and says that the judgment and final order of this Court made and entered in the above-entitled cause on January 10, 1929, in favor of the defendant and against the plaintiff, is erroneous and against the just rights of said plaintiff, and files herein, to-

gether with its petition for appeal from said judgment and order, the following assignment of errors, which it avers occurred in the proceedings in said cause, upon which said final judgment is based:

I.

The Court erred in finding for defendant and in not giving judgment to plaintiff upon the ground that the uncontradicted evidence in the case entitled plaintiff to a judgment in its favor.

II.

The Court erred in making the following finding of fact to wit: That at no time did said vessel (the "Bessie Rutter") engage in or undertake a voyage to Bering Sea for fur sealing. [54]

III.

The Court erred in finding that the boarding and warning of the "Bessie Rutter" on June 29, 1891, at a point near the Popoff Islands in the North Pacific Ocean south of Bering Sea by an officer of the United States vessel "Thetis," acting upon the advice and instructions of the defendant, who gave a warning and prohibition to the master of the "Bessie Rutter" against entering the waters of Bering Sea for the purpose of fur seal hunting, did not interfere with the proposed voyage of the "Bessie Rutter" in that said vessel was not engaged in a voyage to Bering Sea.

IV.

The Court erred in finding that plaintiff's vessel the "Bessie Rutter" at no time did engage in, or undertake a voyage to Bering Sea for fur sealing,

when the uncontradicted evidence showed that the said vessel was bound for Bering Sea on a fur sealing voyage and that said voyage was interrupted and prevented by the action of the defendant.

V.

The Court erred in finding as a conclusion of law that the owner of the schooner "Bessie Rutter" is not entitled to damages.

VI.

The Court erred in rejecting plaintiff's proposed special finding of fact II, submitted to the Court as an amendment to its proposed findings on the ground that the uncontradicted evidence established the fact that the defendant wrongfully and unlawfully interfered with the sealing voyage referred to and set forth in plaintiff's complaint, and that because of such warning and threats of seizure the matter of the "Bessie Rutter" abandoned said sealing voyage into Bering Sea and returned [55] to its home port about July 20, 1891.

VII.

The Court erred in rejecting plaintiff's proposed special finding of fact III submitted to the Court on the ground that the uncontradicted evidence established the fact that because of the wrongful and unlawful interference with the said voyage of the said schooner "Bessie Rutter" by the defendant the said plaintiff was damaged in the sum of $16,870.50.

VIII.

The Court erred in rejecting plaintiff's petition for a rehearing and resubmission of the case, and in

not exercising a sound judicial discretion by permitting a reopening of the case for the introduction of further testimony which had already been taken by deposition on stipulation in order to avoid a miscarriage of justice.

IX.

The Court erred in denying plaintiff's motion to withdraw, vacate and set aside its opinion rendered in defendant's favor on October 29, 1928, and in place thereof to give judgment to plaintiff upon the ground that the uncontradicted evidence in the case established plaintiff's right to a judgment in its favor to which ruling plaintiff duly excepted and which exception was allowed by the Court.

X.

The Court erred in ordering judgment to be entered for the defendant.

That plaintiff remonstrated against and took exception to said findings, rulings and decisions upon the ground that the same were not warranted by or supported by any evidence whatever and are contrary to the uncontradicted evidence of the case. [56]

WHEREFORE the plaintiff on appeal prays that the judgment of the Court be reversed and that it have such other relief as is meet and just.

J. N. GILLETT,
H. H. NORTH,
Attorneys for Plaintiff on Appeal.

Service and receipt of copy admitted this 14th day of Feb. 1929.

GEORGE J. HATFIELD,
U. S. Attorney.
By ESTHER B. PHILLIPS,
Asst. U. S. Attorney.

[Endorsed]: Filed February 14th, 1929. [57]

(Title of Court and Cause—No. 17,341.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That United States Fidelity and Guaranty Company, Incorporated, of Maryland, as surety, is held and firmly bound unto United States of America in the full and just sum of two hundred dollars, to be paid to the said United States of America, its certain attorney or assigns; to which payment, well and truly to be made, said company binds itself, its successors and assigns severally, by these presents.

Sealed with its seal and dated this 14th day of February, in the year of our Lord one thousand nine hundred and twenty-nine.

WHEREAS, lately at a District Court of the United States for the Northern District of California, Southern Division, in a suit pending in said court, between Pacific Hunting & Fishing Company, an Oregon Corporation, No. 17,341, and United States of America, judgment was rendered against the said plaintiff as aforesaid,

and the said plaintiff having obtained from said Court an appeal to reverse the judgment in the aforesaid suit and a citation directed to said United States of America, defendant, [58] citing and admonishing defendant to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California.

Now, the condition of the foregoing obligation is such, that if the said plaintiff, as aforesaid, shall prosecute said appeal to effect, and answer all damages and costs, if it fail to make its plea good, then the foregoing obligation to be void; else to remain in full force and virtue.

And the further condition of the foregoing obligation is such that in case of a breach of any condition thereof, said District Court may, upon notice to said surety of not less than ten days, proceed summarily in said action before mentioned, to ascertain the amount which such surety is bound to pay on account of such breach, and render judgment therefor against it, and award judgment therefor.

Premium charged for this bond is $10.00 per annum.

UNITED STATES FIDELITY AND GUARANTY COMPANY. (Seal)

By (Signed) ERNEST W. COPELAND, (Seal)
Attorney-in-fact.

State of California,
City and County of San Francisco,—ss.

On this 14th day of February in the year one thousand nine hundred and twenty-nine, before me, Amy B. Townsend a notary public in and for the city and county of San Francisco, personally appeared Ernest W. Copeland known to me to be the person whose name is subscribed to the within instrument as the attorney-in-fact of the United States Fidelity and Guaranty [59] Company, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as principal, and his own name as attorney-in-fact.

[Seal] AMY B. TOWNSEND,
Notary Public in and for the City and County of San Francisco, State of California.

Undertaking on appeal, form of undertaking, and sufficiency of surety approved, February 15, 1929.

HAROLD LOUDERBACK,
District Judge.

Service and receipt of copy admitted this 15th day of February, 1929.

GEO. J. HATFIELD,
Attorney for Defendant.

[Endorsed]: Filed February 15th, 1929. [60]

(Title of Court and Cause—No. 17,341.)

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare a transcript of the record in this cause to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, under the appeal heretofore taken and perfected to said Court, and include in said transcript the following pleadings, proceedings and papers on file:

(1) The judgment-roll.
(2) Stipulation waiving trial by jury.
(3) Opinion and findings of the Court, if any.
(4) Order directing entry of judgment.
(5) Bill of exceptions on behalf of plaintiff.
(6) Petition, order and notice of appeal.
(7) Assignment of errors.
(8) Bond on appeal.
(9) This praecipe.

J. N. GILLETT,
H. H. NORTH,
Attorneys for Plaintiff.

Service of the above praecipe for transcript of record by copy admitted this 14th day of February, 1929.

GEORGE J. HATFIELD,
United States Attorney,
Attorney for Defendant.
By ESTHER B. PHILLIPS,
Asst. U. S. Attorney.

[Endorsed]: Filed Feb. 14th, 1929. [61]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing sixty-one (61) pages, numbered from 1 to 61, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe and amended praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $28.40 that the said amount will be charged against the plaintiff and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 28th day of February, A. D. 1929.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [62]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States, to United States of America, and to Honorable GEO. J. HATFIELD, United States Attorney, Its Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, Southern Division, wherein Pacific Hunting & Fishing Company, an Oregon Corporation, is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable HAROLD LOUDERBACK, United States District Judge for the Northern District of California, Southern Division, this 14th day of February, A. D. 1929.

HAROLD LOUDERBACK,
United States District Judge. [63]

Service of the within citation by copy admitted this 14 day of February, 1929.

GEO. J. HATFIELD,
United States Attorney,
Attorney for Defendant.
By ESTHER B. PHILLIPS,
Assistant United States Attorney.

[Endorsed]: Filed February 14, 1929.

[Endorsed]: No. 5745. United States Circuit Court of Appeals for the Ninth Circuit. Pacific Hunting and Fishing Company, an Oregon Corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed March 1, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5745

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC HUNTING AND FISHING COMPANY, an Oregon corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

J. N. GILLETT,
H. H. NORTH,
Merchants Exchange Building,
San Francisco, Calif.,
Attorneys for Appellant.

Parker Printing Company, 523 Clay Street, San Francisco

No. 5745

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC HUNTING AND FISHING COMPANY, an Oregon corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF THE CASE.

This was one of the sealing cases tried before Judge Bourquin in which a judgment was rendered in favor of defendant from which an appeal was taken to this Court, the case being No. 5075, and was joined with other sealing cases on appeal, under the title of *Ellen Bird, et al. v. United States of America,* No. 5067 and reported in 24 Fed. Rep. 2nd Series, 933, Justice Dietrich wrote the opinion in which he said:

> "The Pacific Hunting & Fishing Co., Case. No. 5075, involves a voyage of the Schooner Bessie Rutter in 1891. If in addition to the showing made by official records we accept the testimony of one Spexarth, managing owner for the corpo-

ration of the schooner, the plaintiff was organized for the purpose of carrying on the business of seal hunting and built the schooner for this purpose. She was not suitable for and never engaged in any other trade. She cleared from Astoria March 17th, 1891, for a sealing expedition in the Bering Sea; at least such were the instructions of the owner to the master. She carried a crew of fourteen and four hunting boats, and was provisioned and otherwise equipped for sealing. In the crew were four hunters. The President issued a proclamation against sealing in Bering Sea on June 15, 1891. Thereafter, on June 29th, 1891, and before she reached Bering Sea the schooner was boarded by naval officers who delivered to the master a copy of the Proclamation together with 'warning'. She did not go into Bering Sea and returned to port in July. There was no contradictory evidence and nothing to impeach Spexarth.

We think a finding of a voyage to Bering Sea effectually interfered with by defendant upon a sealing charge could not be reasonably refused. The evidence of damage or loss, however, consisted only of the stipulation referred to, and upon that ground alone judgment should be affirmed."

24 *Fed. Rep.,* 2nd Series, 938.

This is a clear statement of the case.

Justices Gilbert and Rudkin concurring in part with Justice Dietrich's decision, said:

"Judge Dietrich finds that there was no interference in certain of these cases, that there was certain interference in certain other cases, and that in all of the cases the proof of damages was insufficient. We concur in these findings and

conclusions, and also concur in the opinions where no interference was found—but in the remaining cases a new trial should be granted. And while the testimony was insufficient to enable the Court to fix definitely the amount of damages we think that substantial damages were shown, and that an affirmance of the judgments would result in a miscarriage of justice."

Upon this decision this case with several others was reversed and sent back for a new trial.

At the trial plaintiff offered in evidence the same testimony given at the former trial and the further testimony of Captain Fredrick G. Dodge of the United States Coast Guard Service who was on active duty for the Government patrolling in Bering Sea, Arctic Ocean and North Pacific Ocean from the year 1887 to about 1922.

At the trial to meet the objections made by Judge Dietrich in his opinion that proper damages had not been shown the following stipulations were entered into between plaintiff and defendant:

"II. It is further stipulated, that the pelagic fur seal hunting season in the Bering Sea begins about the first day of July and extends to about the middle of September in each season between the years 1886 and 1893, inclusive.

III. And further, that the average catch of fur seal per small hunting boat during the said season of each of the said years within that zone would have been as follows: If a boat were manned by a hunter and two seamen, the average catch for the entire season would be three hundred seals; if manned by a hunter and one sea-

man, two hundred seals; and if the boat were operated by one hunter alone, the average catch would be one hundred seals.

IV. It is further stipulated, that the value of sealskins to the owner of the sealing vessel during the year 1891 was $14.233 per skin.

V. It is further stipulated, that the average cost of shooting a fur seal at the times involved in the present action was five cents per seal; and that the average cost of feeding the men constituting the crew of the vessel at the times involved was fifteen cents per day per man;

And that the defendant is entitled to a deduction from the damages allowed in the foregoing amount per day for each day that said vessel arrived at its home port—in Puget Sound prior to September 22, or at San Francisco prior to September 27.

Dated: This 17th day of July, 1927.

J. N. Gillett,
H. H. North,
Attorneys for Plaintiff.

Geo. J. Hatfield,
United States Attorney,
By Esther B. Phillips,
Assistant U. S. Attorney,
Attorneys for Defendant."

(Trans. 7-8.)

Defendants did not call a single witness and only offered in evidence three public documents found on pages 41, 42, 43 and 44 of Transcript and known as Exhibit No. 1, Exhibit No. 2 and Exhibit No. 3.

Exhibit No. 1 showing the date on which the Bessie Rutter cleared, being March 17, 1891, and the date she entered her home port, being July 20th, 1891;

Exhibit No. 2 showing a manifest of the cargo consisting of 4 breech-loading shotguns; 4 rifles; 30,000 wads, 21,000 primers; 6 kegs powder; 1 keg blasting powder; 21 sacks of shot, and certifies "that a bond had been taken in the sum of one thousand dollars to protect the United States regarding the violation of the law governing trade with Alaska." Exhibit No. 3 was a "Coasting Manifest".

ASSIGNMENT OF ERRORS.

The Court erred in finding for defendant and in not giving judgment to plaintiff upon the ground that the uncontradicted evidence in the case entitled plaintiff to a judgment in its favor.

The Court erred in making the following finding of fact to wit: That at no time did said vessel (the "Bessie Rutter") engage in or undertake a voyage to Bering Sea for fur sealing.

The Court erred in finding that the boarding and warning of the "Bessie Rutter" on June 29, 1891, at a point near the Popoff Islands in the North Pacific Ocean south of Bering Sea by an officer of the United States vessel "Thetis", acting upon the advice and instructions of the defendant, who gave a warning and prohibition to the master of the "Bessie Rutter" against entering the waters of Bering Sea for the purpose of fur seal hunting, did not interfere with the proposed voyage of the "Bessie Rutter" in that said vessel was not engaged in a voyage to Bering Sea.

The Court erred in finding that plaintiff's vessel, the "Bessie Rutter", at no time did engage in, or undertake a voyage to Bering Sea for fur sealing, when the uncontradicted evidence showed that the said vessel was bound for Bering Sea on a fur sealing voyage and that said voyage was interrupted and prevented by the action of the defendant.

The Court erred in finding as a conclusion of law that the owner of the schooner "Bessie Rutter" is not entitled to damages.

The Court erred in rejecting plaintiff's proposed special finding of fact II, submitted to the Court as an amendment to its proposed findings on the ground that the uncontradicted evidence established the fact that the defendant wrongfully and unlawfully interfered with the sealing voyage referred to and set forth in plaintiff's complaint, and that because of such warning and threats of seizure the master of the "Bessie Rutter" abandoned said sealing voyage into Bering Sea and returned to its home port about July 20, 1891.

The Court erred in rejecting plaintiff's proposed special finding of fact III submitted to the Court on the ground that the uncontradicted evidence established the fact that because of the wrongful and unlawful interference with the said voyage of the said schooner "Bessie Rutter" by the defendant the said plaintiff was damaged in the sum of $16,870.50.

The Court erred in rejecting plaintiff's petition for a rehearing and resubmission of the case, and in not

exercising a sound judicial discretion by permitting a reopening of the case for the introduction of further testimony which had already been taken by deposition on stipulation in order to avoid a miscarriage of justice.

The Court erred in denying plaintiff's motion to withdraw, vacate and set aside its opinion rendered in defendant's favor on October 29, 1928, and in place thereof to give judgment to plaintiff upon the ground that the uncontradicted evidence in the case established plaintiff's right to a judgment in its favor to which ruling plaintiff duly excepted and which exception was allowed by the Court.

The Court erred in ordering judgment to be entered for the defendant.

That plaintiff remonstrated against and took exception to said findings, rulings and decisions upon the ground that the same were not warranted by or supported by any evidence whatever and are contrary to the uncontradicted evidence of the case.

To all of which plaintiff duly excepted and said exceptions were allowed by the Court (Trans. 65-68).

I.

THE COURT ERRED IN FINDING "THAT AT NO TIME DID SAID VESSEL ENGAGE IN OR UNDERTAKE A VOYAGE TO BERING SEA FOR FUR SEALING".

The foregoing finding is contrary to the uncontradicted and undisputed evidence in the case and is

not supported by any evidence whatever, and plaintiff duly excepted to it which exception was allowed by the Court.

We will now call the Court's attention to the undisputed and uncontradicted evidence showing that the plaintiff on March 17, 1891, sent its schooner, the "Bessie Rutter" on a sealing voyage to Bering Sea.

The depositions of A. G. Spexarth, a witness on behalf of plaintiff, was taken on April 9, 1925, and on July 13, 1926. We call the Court's attention to the testimony given by him in his first deposition which is found commencing on page 27 of the transcript:

"Direct Examination.

My name is A. G. Spexarth and I reside at Astoria, Oregon. I am an American citizen. I was living at Astoria in 1891. I was connected with the plaintiff, the Pacific Hunting & Fishing Company, an Oregon corporation. It was organized under the laws of the State of Oregon for the purpose of seal-hunting in the Bering Sea.

In 1891 this company owned a schooner called the 'Bessie Rutter,' about 35 tons. Our company built the schooner for sealing. On March 17th she cleared from the port of Astoria on a fur-sealing expedition bound for Bering Sea. Her master was Henry Olsen and I instructed him that he was to go sealing in Bering Sea. There were 14 in the crew and she carried four hunting boats and was provided and equipped for a voyage of from eight to ten months. Four of the crew were good hunters.

Q. Of course you have no knowledge yourself as to whether they got into Bering Sea or not?

A. No.

Q. Do you remember when she returned into port?

A. She returned in the late summer—in July."

* * * * * * *

"Q. She did not get into the Bering Sea?

A. No, not at all."

* * * * * * *

"Q. In 1891 was the date of the incorporation of this company? A. Yes, sir.

Q. And 1891 was also the date of the building of this vessel? A. Yes, sir.

Q. And the $10,000 paid into the capital you referred to, was this wholly for the construction of this vessel and her equipment? A. Yes, sir.

Q. And fitting her out?

A. Yes, fitting her out for sea.

Q. With stores and everything for hunting and fishing voyage; is that true?

A. Yes, sir. * * *

Q. Do I understand that the schooner 'Bessie Rutter' which is the vessel you constructed, left Astoria in the spring of 1891 for a hunting and sealing voyage?

A. Yes, for hunting and sealing.

Q. And that she carried four hunting boats and had 14 men? A. Yes, sir.

Q. And of these men four were hunters?

A. Four hunters, yes."

The company owned no other property except this vessel. It was a $10,000 corporation and the money was paid out for the building of the vessel and fitting her out for sea with stores and everything for a hunting and fishing voyage.

The 'Bessie Rutter' left Astoria in the spring of 1891 for a hunting and fishing voyage. She carried four hunting boats and had 14 men, four of whom were hunters.

"Q. Now, in the spring of 1891 when this vessel left port, how were you connected with the company other than as a stockholder?

A. In no other way except that I furnished the supplies. That was a private affair.

Q. Were you managing the vessel?

A. I was managing the vessel on shore, but I was not aboard.

Q. Did you issue instructions to the master as to where he was to go and what he was to do?

A. Yes, sir.

Q. Was that part of your shore management?

A. Yes, sir.

Q. Just what did you instruct the captain to do?

A. The captain was instructed to proceed to the Bering Sea and had all the things that were necessary to prosecute the voyage; also some minute instructions were given as to the use of the fishing nets that were put aboard—to catch seal with the net. * * *

Q. In whose name as owner was this vessel documented?

A. Myself as managing owner. The other stockholders were American citizens."

"Redirect Examination.

"At the time the 'Bessie Rutter' was fitted out for the voyage I was president of the corporation. This vessel was originally owned by private ownership. Mr. Freeman was an American citizen and the others were naturalized citizens.

At the time of the interference with the voyage of the 'Bessie Rutter' of 1891 the stockholders of Pacific Hunting & Fishing Company were Henry Olsen, 62 shares; A. G. Spexarth, 93 shares; Samuel Freeman, 62 shares, and Theodore Bracker, 186 shares; and also, Theodore Bracker had acquired at that time 93 shares from William Olsen.

Recross Examination by Mr. Maytham.

Q. Was this vessel ever engaged in any other work than in sealing and hunting?

A. No, sir; the vessel was not suitable for any other trade; it was only 35 ton."

The Court, after making its finding "that at no time did said vessel engage in or undertake a voyage to Bering Sea for fur sealing" made the following finding No. III:

> "On June 29, 1891, the 'Bessie Rutter' had reached a point near the Popoff Islands in the North Pacific Ocean, South of Bering Sea, and at that time and place, the schooner was boarded by an officer of the United States Vessel 'Thetis', upon the advice and instructions of the defendant, and that a warning and prohibition was then delivered to the master of the 'Bessie Rutter' by said officer of the 'Thetis' against entering the waters of Bering Sea for the purpose of fur seal hunting." (Tr. 10-11.)

Here is a direct finding that the defendant through its naval officers boarded the "Bessie Rutter" and warned its master not to enter Bering Sea to hunt for seal and the uncontradicted evidence shows that this warning was heeded and complied with and that the "Bessie Rutter" returned to her home port reaching there on the 20th of July, 1891, as shown by defendant's Exhibit No. 1 found on page 41 of the Transcript.

The only question is: "Was the 'Bessie Rutter' on a sealing voyage bound for Bering Sea" and we contend that the uncontradicted and unimpeached evi-

dence in the case conclusively proves that she was and, therefore, the Court erred in finding "That at no time did said vessel engage in or undertake a voyage to Bering Sea for fur sealing"; and also, committed error in rejecting plaintiff's proposed finding submitted to it which was as follows:

> "On or about the 17th day of March, 1891, the plaintiff cleared said vessel for a voyage to hunt for fur seal in the North Pacific Ocean and Bering Sea and on June 29th, 1891, while on said voyage and near the Popoff Islands in the North Pacific Ocean, she was boarded by an officer of the United States vessel 'Thetis', who acting upon the advice of and instructions from the defendant boarded the 'Bessie Rutter' and then and there delivered to her master a warning against entering the waters of Bering Sea for the purpose of fur seal hunting on pain of the seizure and forfeiture of the said 'Bessie Rutter' for so doing. That because of such warning and threats of seizure the master of the 'Bessie Rutter' abandoned said sealing voyage into Bering Sea and returned to its home port, Astoria, Oregon, about July 20th, 1891." (Transcript 59.)

As already referred to this Court has decided, basing its decision upon the evidence hereinbefore set forth, in reversing the decision rendered by Judge Bourquin, that the "Bessie Rutter" "cleared from Astoria March 17, 1891, for a *sealing expedition in the Bering Sea*" and that "thereafter, on June 29th, 1891, and before she reached Bering Sea, the schooner was boarded by naval officers who delivered to the master a copy of the Proclamation together with warnings. We think a finding of a voyage to Bering

Sea effectually interfered with by defendant upon a sealing charge could not be reasonably refused." *The Pacific Hunting & Fishing Company,* Case No. 5075, Vol. 24, Fed. Rep., 2d Series, 938.

At the trial counsel for defendant contended that because it appeared from Defendant's Exhibit No. 1, (page 41 Transcript) that the "Bessie Rutter" cleared from Astoria, Oregon, destination Sand Point, Alaska, that her owners never intended a voyage to Bering Sea.

This was a proper clearance and under it and the law and the rules and regulation of commerce, the "Bessie Rutter" could hunt for fur seal on the high seas and in Bering Sea. This is clearly shown by the testimony of plaintiff's witness Captain Dodge who at that time and for years prior thereto and afterwards was in the Coast Guard Service operating in Bering Sea and the North Pacific Coast.

He gave the following testimony:

> "In 1887 I entered the Coast Guard Service as a cadet, and in 1927, I retired as a Commodore in the Coast Guard Service.
>
> Q. Is it a part of the duty of the Coast Guard officers to examine ship's papers?
>
> A. That is one of their primary duties. A coast guard officer is also an inspector of customs and he has the same authority as a collector of customs.
>
> Q. When you were at the cadet school did you make a study of the navigation laws of the United States?
>
> A. That was one of our primary duties, to study the navigation laws and ship's papers of

all kinds; a coast guard officer is supposed to be an expert on those things.

Q. What would be the significance of a schooner, sailing schooner, clearing from Astoria for Sand Point, Alaska, the vessel being a registered vessel?

A. That would signify that Sand Point, Alaska would be her first point of call; she would touch there first after leaving Astoria; if the vessel was going to proceed from there she would clear from there for another port wherever she chose to go and obtain clearance papers there.

The COURT. In other words, it is put under a legal obligation to go to the port to which it has cleared?

A. To which it has cleared.

Q. Having accomplished that it is under no obligations to go to any particular place?

A. No; after that when she arrives at that port the law compels her to enter the vessel there, and if he does not report to the collector of customs her arrival there inside of 24 hours she is subject to a fine; *if he is trading he may obtain cargo there for the next port. Or, he may go to another cargo port. Or, he may go whaling or hunting.*

Q. Is there any other significance than that Sand Point was their first point of touching?

A. Only that she cleared for that point and he would be under the duty of going to that port and presenting her clearance or ship papers." (Trans. 45, 46 and 47.)

"Cross Examination.

"Q. The sealing business up there, was there any distinction made particularly as to the privilege of a vessel that was enrolled, a vessel that was registered, and the vessel that was licensed in the coasting trade? A. None whatever.

Q. That is, vessels that were up there, could do any one of those things whatever her papers were?

A. Any one of them, as long as the papers were all right. If she had papers under registry she could engage in sealing if she was under enrollment or under license 20 tons." (Transcript 49.)

On redirect examination he testified as follows:

"Mr. NORTH. * * * Q. I will show you these exhibits 1, 2 and 3 of the United States, and ask you to examine them, Captain.

A. That is a manifest of the schooner's cargo, bound from Astoria to Sand Point; that is a clearance, and this is a coasting manifest.

Q. Do you observe anything on these papers that would show anything except the intention to stop at Sand Point after leaving Astoria, Oregon?

A. Yes, there is a manifest here that shows she had guns and rifles, primers, powder, etc.; there is nothing on that coastwise manifest that would indicate that she was doing anything except going on a hunting voyage, I should say.

Q. Isn't it a fact that the majority of the registered vessels that came under your inspection simply cleared for hunting and fishing?

A. Most of them engaged in fishing cleared for hunting and fishing.

Q. *But this (showing plaintiff's exhibit, the clearance for Sand Point) would be a perfectly proper paper for a vessel that was intending to hunt seal in the Bering Sea?*

A. Yes, sir." (Transcript 50-51.)

This testimony of Captain Dodge was not contradicted by any witness and no evidence was offered to the contrary and is fully supported by the law and

the rules and regulations of commerce existing at that time and which exists today.

If this clearance of the "Bessie Rutter" was a proper clearance, as testified to by Captain Dodge, "*For a vessel that was intending to hunt seal in the Bering Sea,*" then no inference can, in the absence of other evidence or circumstances, be drawn that the "Bessie Rutter" did not intend a voyage to Bering Sea. All the evidence in the case clearly proves that this must have been her intention and this Court in its decision in the *Bird Case, et al.,* hereinbefore referred to, has so held.

On cross-examination, Mr. Spexarth was asked the following question, and gave the following answer:

> "Q. Was this vessel ever engaged in any other work than sealing and hunting?
> A. No sir; the vessel was not suitable for any trade; it was only 35 ton." (Transcript 32.)

Defendant's Exhibit No. 2, being "Bessie Rutter's" Manifest, and found on page 42 of the Transcript, shows that the cargo on board consisted only of four breech-loading shotguns, 4 rifles and ammunition for the same, and that a bond had been taken in the sum of one thousand dollars to protect the Government regarding the violation of the laws which prohibited the sale of arms and ammunition in Alaska. She carried no cargo to Alaska and went to Sand Point and received no cargo there. She was a hunting vessel on a seal-hunting voyage, and carried a crew of fourteen, four of whom were hunters.

That she was on a sealing voyage, no matter how her clearance papers may have read, is conclusively shown by plaintiff's exhibit No. 6 on file with the records on this appeal being a "map showing positions of sealing vessels seized or warned by the Government of the United States during the season of 1891." This map was prepared at the office of the U. S. Coast and Geodetic Survey from official reports in the possession of the State Department and is an official document.

This map shows sealing vessels that were "seized or warned" by the gunboats of the defendant in 1891 and the "Bessie Rutter" appears on the map as having been warned on June 29th, 1891, by the U. S. S. Thetis. Many other sealing vessels, as shown by this map, were warned on June 26, 27, 28, 29 and 30 at or near where the "Bessie Rutter" was warned. All were following the sealherd on its way to Bering Sea which would arrive there about July 1st and when she was warned she was right in the midst of the sealherd on its way to Bering Sea as shown by the migration chart of seal prepared by the Government and introduced in evidence as Plaintiff's Exhibit No. 8 now on file in this case with the records of this case.

On the map showing vessels that were warned or seized in 1891, plaintiff's Exhibit No. 6, it appears that on the 29th day of June, when the "Bessie Rutter" was warned by the U. S. S. Thetis that she also served a notice on the sealing vessels Geo. A.

White, Mattie T. Dyer, Venture, Annie F. Paint, Henry Dennis and Emmet Felitz, all engaged in seal-hunting. Actions were commenced in the District Court to recover damages for the interference with the sealing voyages of the Mattie T. Dyer, Venture, Henry Dennis and Emmet Felitz. Judgments in favor of the owners of these vessels have been recovered in each of said actions and have been paid.

Why should any relief be denied the owners of the "Bessie Rutter"? She, like the others, was on a sealing voyage, following the same herd on its way to Bering Sea and in the same zone and warned by the same vessel on the same day. At the time of her warning she was not sailing for Sand Point but was following the sealherd on its usual and direct course to Bering Sea, and if she and the other vessels referred to had not been interfered with by the defendant, can there be any question or doubt that they would have followed the seal into Bering Sea and hunted them there during the sealing season which it was stipulated "begins about the first day of July and extends to about the middle of September".

The evidence shows that after the first day of July the seal are all in Bering Sea.

Fredrick G. Dodge testified "Hunting is done to the Southward until about the first of July and after that in Bering Sea. All the fur seals are in Bering Sea after the first of July" (Transcript 36).

To the same effect is the testimony of George G. Wester (Trans. 39).

Sand Point was on or near the route followed by the seals on their way to Bering Sea and many sealing vessels stopped and rendezvoused there and the "Bessie Rutter" was only following the custom of the others. This fact is shown by Plaintiff's Exhibit No. 4, being a Government document referring to the warning of sealing vessels in the year 1891. In this document we call the Court's attention to confidential communications given by the Secretary of the Navy to Commander C. S. Cotton (see Transcript page 20, from which we quote the following):

> "Orders directing Thetis, Alert and Mohican to rendezvous at Sand Point revoked. Thetis will proceed to Sand Point as directed to distribute proclamation and give notice and will proceed thence to Unalaska immediately after departure of British steamer which visits Sand Point about July first to bring home coast catch of seal. Mohican and Alert after cruising two weeks as previously directed in Bering Sea will rendezvous with Thetis at Unalaska instead of Sand Point. Marion will sail later and join your command at Unalaska at about same time. Has Thetis already sailed? If so you must communicate with her at Sand Point where her orders of yesterday directed her to await your arrival. On receipt of this order proceed immediately to Bering Sea with Thetis, Mohican and Alert. Telegraph departure.
>
> (Signed) B. F. Tracy."

To vessels on a sealing voyage to Bering Sea, Sand Point was a favorable place to stop and in many instances a necessary one. The "Bessie Rutter" like many other sealing vessels could have intended when it cleared, to stop there for supplies, for mail, fresh

water, repairs or to ship home her spring catch of seal made along the Pacific Coast, and, therefore, having this in mind and Sand Point being in a "Great District" other than Astoria, Oregon, the home port of the "Bessie Rutter" it was necessary to clear for Sand Point so she could enter there and do what a three and one-half months' voyage on the high seas already accomplished might require to be done before she could continue her voyage to Bering Sea. The same rules applied then as applies today under Article 179 of General Regulations of the Customs and Navigation Laws which provides that "all vessels engaged in the coasting trade proceeding between ports in different great coasting districts must enter and clear."

A vessel employed in whaling, fishing or sealing was engaged in the coasting trade. A clearance for the coasting trade gives to the owner of the vessel cleared the right to hunt for seal or to fish anywhere on the high seas. Under this clearance a vessel was authorized to hunt for seal along the Pacific Coast and in Bering Sea. This right is abundantly supported by decisions of the Federal Courts and is well recognized.

> "The cod fishery is a trade within the true intent and meaning of Sec. 32nd of the Act of 1793, so is the mackerel fishery. Trade in the Act is used as equivalent to occupation, employment or business for gain or profit."
>
> *The Nymph,* 18 Fed. Cases, 506, Case No. 10388, 10389.

> "The fishing business is a trade within the meaning of the license act of Feb. 18, 1793. The the meaning of the word trade in the Act is equivalent to employment."
>
> 24 *Fed. Cases* 456, No. 16,004.

> "The meaning of the word trade in the act is equivalent to employment."
>
> *The Parynthe Davis,* 27 Fed. Cases, 456.

We respectfully submit that the clearance made by the schooner "Bessie Rutter" was one which permitted her to hunt seal in Bering Sea without mentioning the fact that her voyage was for Bering Sea.

Captain Fredrick Dodge who for years was in the Coast Guard Service of the Government patrolling Bering Sea and the waters of the Pacific Coast and Alaska and whose testimony on this subject has already been referred to, testified as follows:

> "A vessel under enrollment and license could be employed in the coasting trade or fisheries that is anywhere along the coast of the United States in domestic waters of all kinds. Fur seal hunting is classed as coasting trade." (Transcript 35.)

When shown the clearance of the "Bessie Rutter" he testified that it was a "perfectly proper paper for a vessel intending to hunt seal in the Bering Sea" (page 51, Transcript).

Strong and convincing evidence that she proposed to extend her sealing voyage beyond Sand Point and into Bering Sea is shown by the fact that after the

"Bessie Rutter" was warned she went into Sand Point, reported there and cleared for the Port of Yokohama, Japan (see page 44 of Transcript). She had no cargo for Japan, she only carried her equipment for seal-hunting and the master must have had in mind to try and hunt seal on the Japan Coast not being permitted to go to Bering Sea, but later he must have learned that the sealing season on the Japan Coast closed in June, and learning this he sailed for his home port, Astoria, Oregon, where he arrived on July 20th.

Captain George G. Wester, one of the oldest and best known seal-hunters gave the following testimony:

> "Along the Japanese Coast the hunting of seals ceases to be profitable about the first of June when they leave there and follow up the coast until they get home to their rookeries on Komandorski Islands." (Trans. 39.)

We respectfully submit that the uncontradicted and unimpeached evidence conclusively proves that on the 17th day of March, 1891, the plaintiff cleared the "Bessie Rutter" on a sealing voyage for Bering Sea, and while on that voyage and on the 15th day of June, 1891, the President of the United States issued a proclamation prohibiting seal-hunting in Bering Sea and ordered a fleet of vessels to patrol the sea and to warn all vessels not to enter Bering Sea for the purpose of hunting seal, and while on said voyage and on the 29th day of June she was boarded by an officer from the U. S. S. Thetis and warned not to

enter Bering Sea to hunt seal and, acting upon this warning the master of the "Bessie Rutter" abandoned the sealing voyage to Bering Sea and returned her to her home port where she entered on July 20th, 1891.

Under these undisputed and uncontradicted facts we respectfully submit that the Court erred in finding "that at no time did said vessel engage in or undertake a voyage to Bering Sea for fur sealing" to which plaintiff duly took an exception, and erred in rejecting and refusing to adopt plaintiff's proposed finding, to wit:

> "On or about the 17th day of March, 1891, the plaintiff cleared said vessel for a voyage to hunt for fur seal in the North Pacific Ocean and Bering Sea and on June 29th, 1891, while on said voyage and near the Popoff Islands in the North Pacific Ocean, she was boarded by an officer of the United States vessel 'Thetis,' who acting upon the advice of and instructions from the defendant boarded the 'Bessie Rutter' and then and there delivered to her master a warning against entering the waters of Bering Sea for the purpose of fur seal hunting on pain of the seizure and forfeiture of the said 'Bessie Rutter' for so doing. That because of such warning and threats of seizure the master of the 'Bessie Rutter' abandoned said sealing voyage into Bering Sea and returned to its home port, Astoria, Oregon, about July 20th, 1891," (Tr. 59.)

to which rejection and refusal the plaintiff duly excepted and which exception was allowed (Tr. 60).

II.

THE COURT ERRED IN FINDING FOR DEFENDANT AND IN NOT GIVING JUDGMENT TO PLAINTIFF UPON THE GROUND THAT THE UNCONTRADICTED EVIDENCE IN THE CASE ENTITLED PLAINTIFF TO A JUDGMENT IN ITS FAVOR.

At the close of the trial plaintiff made a motion asking that a judgment be entered in plaintiff's favor which motion was denied to which plaintiff duly excepted whereupon the Court made the following order:

> "Motion of plaintiff heretofore herein made asking for judgment in plaintiff's favor on the ground that plaintiff established the material allegations of its complaint by uncontradicted evidence is denied, and plaintiff having duly excepted to said ruling of court, said exception is hereby allowed.
>
> Dated this 12th day of January, 1929.
>
> Harold Louderback, District Judge."
>
> (Trans. page 61.)

We have already called the Court's attention to the fact that the undisputed, uncontradicted and unimpeached evidence in the case clearly and conclusively shows that the "Bessie Rutter" on March 17, 1891, cleared for a sealing voyage to Bering Sea and while on that voyage and on the 29th day of June, 1891, she was boarded by an officer from the U. S. S. Thetis acting under instructions from the defendant and warned not to enter Bering Sea to hunt seal and acting upon such warning the master of the "Bessie Rutter" abandoned its voyage to Bering Sea and returned to its home port on July 20th, 1891. There-

fore, it is not necessary again to recite the testimony in the case which conclusively proves this to be true.

At the trial the following stipulations were entered into (see Transcript 14 and 15):

> "It is further stipulated that the pelagic fur seal hunting season in the Bering Sea begins about the first day of July and extends to about the middle of September in each season (12) between the years 1886 and 1893, inclusive.
>
> And further, that the average catch of fur seal per small hunting boat during the said season of each of the said years within that zone would have been as follows: If a boat were manned by a hunter and two seamen, the average catch for the entire season would be three hundred seals; if manned by a hunter and one seaman, two hundred seals; and if the boat were operated by one hunter alone, the average catch would be one hundred seals.
>
> It is further stipulated, that the value of sealskins to the owner of the sealing vessel during the year 1891 was $14.233 per skin.
>
> It is further stipulated, that the average cost of shooting a fur seal at the times involved in the present action was five cents per seal; and that the average cost of feeding the men constituting the crew of the vessel at the times involved was fifteen cents per day per man.
>
> And that the defendant is entitled to a deduction from the damages allowed in the foregoing amount per day for each day that said vessel arrived at its home port—in Puget Sound prior to September 22, or at San Francisco prior to September 27."

Because of the warning served upon the Bessie Rutter by the U. S. S. Thetis its voyage into Bering

Sea for the full sealing season from July 1st to September 15th was interfered with and terminated and its prospective catch of fur seals therein estimated by said stipulations at 300 seals for each of the three-men hunting boats or a total of 1200 skins of the net average value of $14.233 per skin, as stipulated, was prevented to the damage of plaintiff in the sum of $17,079.60 from which, under said stipulations, is to be deducted five cents per seal, cost of shooting amounting to $60.00, also a deduction of 15 cents per day, as stipulated, for feeding fourteen members of the crew seventy-one days amounting ot $149.10. This would leave a total of $16,870.50 for which sum judgment should have been rendered in plaintiff's favor and we move the Court that it direct that a judgment in that amount be entered in plaintiff's favor.

Plaintiff has been put to heavy costs in trying this case twice in the District Court and for the two appeals taken to this Court, none of which can be recovered against the Government. It being admitted and so found by the trial court in its Finding III that the "Bessie Rutter" "was boarded by an officer of the United States vessel 'Thetis' upon the advice and instructions of the defendant and that a warning and prohibition was then delivered to the master of the 'Bessie Rutter' by said officer of the 'Thetis' against entering the waters of Bering Sea for the purpose of fur sealing" and it having been stipulated what the prospective catch of seal would have been and also stipulated what the expenses of making the

catch would have been there is no good reason why judgment should not be entered in plaintiff's favor and save it the costs of another trial.

The Supreme Court or a Circuit Court of Appeals may affirm, modify or reverse any judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require (U. S. Rev. S. Sec. 701).

The Circuit Court of Appeals may in reversing a decision of the District Court in an action at law direct the Court to enter a judgment for the plaintiff for a stated sum. In the case of *Rosenfeld v. Scott,* an action brought under an Act of Congress permitting a person who had paid a tax on a trust estate to recover the amount paid the Court in rendering its decision said:

> "The judgment is reversed with directions to the court below to enter judgment in favor of plaintiff for $2,998.80 with interest and costs."
>
> *Rosenfeld v. Scott, Collector of Internal Rev.,* 245 Fed. 646.

A recent decision on the point under consideration is that of *Bank of Waterproof v. Fidelity & Deposit Co.,* 299 Federal Reporter 481. In its decision the Court says:

> "The plaintiff in error has filed a motion that judgment be entered by this court in its favor. The motion will be granted. The jury having been waived, and that Court having reached the conclusion that the plaintiff in error was entitled to a judgment there is no reason for remanding

the cause for further consideration by the District Court."

Insurance Companies v. Boyken, 12 Wall. 433;
Fellman v. Royal Ins. Co., 184 Fed. 577;
Walter v. Gulf & Interstate Ry. Co., 269 Fed. 85.

"It is therefore ordered that the clerk of this Court enter a judgment for the plaintiff in error for $5,000 that being the amount of the bond sued on, together with interest thereon at the rate of 5 per cent. per annum from the date suit was filed, and certify such judgment to the District Court."

Of all of the sealing cases that have been tried in which judgments have been rendered in plaintiff's favor we consider this case as meritorious as any of them. The uncontradicted evidence proves a voyage to Bering Sea to hunt for fur seal and Government records offered in evidence show that while the "Bessie Rutter" was on that voyage she was boarded by a U. S. naval officer who, acting under instructions, warned her master not to enter Bering Sea to hunt for seal and because of such warning and interference the master abandoned the voyage and returned to the home port. The stipulations entered into at the trial clearly establish the damages suffered by plaintiff because of such interference and quoting from this Court's decision applying to this case, in reversing the decision of Judge Bourquin when this

case with other sealing cases was passed upon in the *Bird* case, hereinbefore referred to,

> "That an affirmance of the judgment would result in a miscarriage of justice."

Respectfully submitted,

J. N. GILLETT,

H. H. NORTH,

Attorneys for Appellant.

No. 5745

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

PACIFIC HUNTING AND FISHING COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Brief in Behalf of Appellee

GEO. J. HATFIELD,
United States Attorney,

ESTHER B. PHILLIPS,
Asst. United States Attorney,
Attorneys for Appellee.

Neal, Stratford & Kerr, S. F.

No. 5745

IN THE

SOUTHERN DIVISION

OF THE

United States District Court

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

PACIFIC HUNTING AND FISHING COMPANY, a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF IN BEHALF OF APPELLEE

STATEMENT OF THE CASE.

This is an appeal from a judgment rendered by the District Court for the Northern District of California in favor of the United States. This is the second time this case has been appealed to this court. The first appeal was from a judgment rendered by Judge Bourquin in favor of the United States; the second appeal is from a judgment rendered by Judge Louderback in favor of the United States.

The appellant filed a suit for $36,400 against the United States under the Sealing Claims Act of 1924, on the theory that its vessel, the "Bessie Rutter" was interfered with in June, 1891, by the United States warship "Thetis" in the course of a voyage undertaken by the "Bessie Rutter" for hunting fur seal in Bering Sea. The interference which the "Thetis" is said to have made is simply having a boarding officer go on board the "Bessie Rutter" and warn her against sealing in Bering Sea. It was the contention of the government in the court below that the evidence did not show that this vessel undertook or was engaged in a voyage to Bering Sea and that therefore the act of the "Thetis" in warning her not to seal in Bering Sea was of no consequence and did not damage the "Bessie Rutter" or her owners. The court found in the government's favor upon these issues.

Appellant's opening brief gives most of the material facts with a few significant exceptions. The government offered three exhibits in its defense, to which appellant makes slight reference. For the convenience of the court, we have quoted these records in full as an appendix to this brief. These exhibits were not in evidence at all at the former trial before Judge Bourquin. The defendant's exhibit No. 1 was a clearance record taken from the records of the Custom House in Astoria, Oregon, in which it appears that on March 17, 1891, the schooner "Bessie Rutter" cleared from Astoria. Her destination is stated as "Sand Point, Alaska". In the same exhibit, the entrances of coastwise records at the same port are given. It appears

that on July 20, 1891, the schooner "Bessie Rutter" entered as coming from "Sand Point, Alaska". Similarly, two manifests were offered in evidence by the defendant. Exhibit No. 2 was her manifest leaving Astoria, Oregon. In the body of the manifest the vessel is stated as "bound from Astoria, Oregon, for Sand Point, Alaska". The clearance signed by the Deputy Collector gives permission to the vessel to proceed "to the port of Sand Point in the territory of Alaska". Exhibit No. 3 is a second manifest issued by a Deputy Collector at Sand Point, Alaska. In this last record, permission is given to the vessel "to proceed to the port of Yokohama in the state of Japan". The foregoing exhibits (Defendant's Exhibits 1, 2 and 3), were not in evidence at all at the former trial and were not before this court when the first appeal was considered.

In rebuttal, appellants offered the testimony of Frederick G. Dodge, who was for many years in the United States Coast Guard Service and stationed in Alaska. Portions of Captain Dodge's testimony are quoted in appellant's brief, pp. 13 to 15. The substance of the testimony quoted in the brief is that Sand Point, Alaska, does not necessarily mean the destination of the vessel, but merely that it would be the first point of call; and that having cleared from Sand Point, Alaska, the vessel was then free to go elsewhere. It was his testimony that if a vessel intended to hunt seal in Bering Sea, she might, with propriety, get a clearance for Sand Point.

This was not the only testimony that Captain Dodge gave on this point, however. Upon cross-examination,

Captain Dodge admitted that a vessel going from San Francisco or any other of the coast ports, intending to fish on the high seas, need not go into any port at all. He testified:

> "Q. A vessel going from San Francisco or any of these coast ports, going to fish on the high seas, did not have to go into any port, did she?
>
> A. No.
>
> Q. She could go out on the high seas and come back without entering any other port? Isn't that true? A. Yes.
>
> Q. It does not matter whether she was enrolled or registered or licensed, does it?
>
> A. No. (Rec. p. 50).

On re-direct examination, Captain Dodge testified further:

> "Q. Isn't it a fact that the majority of the registered vessels that came under your inspection simply cleared for hunting and fishing?
>
> A. Most of them engaged in fishing cleared for hunting and fishing.
>
> Q. But this (showing plaintiff's exhibit, the clearance for Sand Point) would be a perfectly proper paper for a vessel that was intending to hunt seal in the Bering Sea? A. Yes, sir.
>
> (continuing)
>
> From my observations during many years vessels that cared to hunt in Bering Sea simply cleared for hunting and fishing without stating their destination, some cleared for the coasting trade. If a vessel goes out from one port intending to stay out on the high seas for hunting and fishing, she does not have to enter a port at all. The seal fisheries at that time in Bering Sea were out on the high seas, so most of the vessels that would sail for hunting and fishing would not state their destination."

It is our contention that the judgment of the lower court in favor of the defendant is sustained by the record. We beg to submit to your Honors, first, those principles of law which we conceive to be involved in the case; and secondly, a discussion of the facts in evidence. The parties will be referred to in this brief as plaintiff and defendant, following the nomenclature in the lower court.

ARGUMENT.

I.

I. The burden of proof was on the plaintiff to show that a specific voyage to the American side of Bering Sea was undertaken by the vessel in question.

The Sealing Claims Act is not unlimited in its terms; only claims of a particular and special type are recognized. The plaintiff must show loss or damage occurring

> "from the seizure, detention sale or interference with their voyage by the United States of vessels charged with unlawful sealing in the Bering Sea and waters contiguous thereto and outside of the three-mile limit."

Furthermore, there must have been an intent to seal in the waters of Bering Sea which were claimed as American. The various restrictions were leveled at pelagic sealing west of the line of demarcation between Russian and American waters. Our government did not pretend to patrol or interfere with hunting in the Russian side of Bering Sea.

This is a primary requirement of the proof in plaintiff's case—*a sina qua non.* This question was ruled

upon by Judge Bourquin in a group of cases tried about two years ago in which judgments were rendered in favor of the government. Appeals were taken, and in seventeen of the twenty-four cases appealed this court affirmed Judge Bourquin's judgment. In many of the cases on appeal, the question whether the proof showed that a voyage "to Bering Sea" was undertaken was directly involved. This Court in affirming Judge Bourquin's judgments, approved his language and definition in no uncertain terms. Judge Bourqin in his opinion in the case of Beck v. United States, No. 17183 which opinion was incorporated in all of his decisions in the seventeen cases, said

> "It is not enough in any case that plaintiff had sealed in Bering Sea in another voyage and might have voyaged to that—and in the year in issue in this case, but did not. Nor is it enough that he was afloat in the ocean with vague, fleeting, nebulous thoughts of sealing in the Bering Sea not put into action. Not merely possible or contemplated voyages are within the statute, but as aforesaid only specific voyages intended, determined, equipped, begun—acts as well as intents."

In the opinion in the case of Bird v. United States, 24 Fed. (2d) p. 933, this court said

> "Inasmuch as most of the claims rest upon the charge of 'interference' only, it is to be said that 'voyage' as used in the Act, imports an actual voyage, as distinguished from one existing only in desire, or which might possibly or probably have been undertaken but for the well known objection of the officers of the government. There must have been interference with a specific voyage, in progress, with the matured purpose of sealing in the designated waters and interference

> must have been on account of or on a charge of such purpose, which was then claimed to be unlawful. Mere warning or notice of the government's attitude, to a vessel afloat, but having no present intent to make a sealing voyage into such waters, would not constitute the requisite interference, nor would interference with or seizure of a sealing vessel in good faith, upon some ground other than the charge that she was sealing or intending to seal in the forbidden waters, be sufficient to bring the case within the statute."

The foregoing language is general in terms. There are, however, applications of it in the particular cases following the statement of general principles. For example, in the

Ladd Case, No. 5080, 24 Fed. (2d) p. 940

involving the voyage of the schooner "Lily L" in 1890, the evidence showed that the schooner in fact cleared "for a hunting and fishing voyage". The opinion of the lower court was that the proof failed as to whether a voyage to Bering Sea was intended. The judgment was affirmed on appeal. Similarly, in the

Ladd Case, No. 5082, 24 Fed. (2d) p. 941

where the voyage of the "Emma" and "Louisa" for 1891 and 1893 was involved, Judge Bourquin found against a projected voyage to Bering Sea. This was affirmed on appeal.

A striking application of the rule appears in the

Ladd Case, No. 5084, 24 Fed. (2d) p. 942

where the voyage of the "Lily L" for 1893 was involved. In that case, Judge Bourquin held against the projected voyage. The Circuit Court of Appeals in affirming this judgment said:

> "But if we give effect to what are little more than incompetent conclusions, the most that can be said in respect to sealing in Bering Sea is that, when the voyage was projected, and thereafter, the purpose of the owners and of the captain was to seal in the Pacific Ocean and not in Bering Sea unless permission was granted so to do. We think the finding against a broken voyage was clearly right."

On reviewing the summary of the evidence introduced in this last case, it will be seen that the plaintiffs there showed some sort of a purpose eventually to seal in Bering Sea. This the court held was not sufficiently specific, that is, the plaintiff's only intention to go in Bering Sea was conditioned on a change in the government's restrictions. This the court held was not a sufficient showing of intent and affirmed Judge Bourquin's decision against a broken voyage.

The

Cohn case, No. 5085, 24 Fed. (2nd) p. 943

was substantially like the Ladd case immediately preceding.

These cases are illustrative of the burden of proof under which plaintiff labors, and of the point that the trial court is not required to hold that all sealing vessels were necessarily bound for Bering Sea.

If the history of the Sealing Claims Act is examined, particularly the report of the Committee on Judiciary to the lower house, made March 1, 1924, it will be seen that the entire purpose of the act was to cover interference with voyages undertaken "to Bering Sea". The requirement that a voyage to Bering Sea must be

proved, is therefore grounded on a sound principle of statutory construction. The trial court was therefore bound to apply this principle of law to the facts in the present case.

II. The proof in the present case supports the finding of the trial court that no voyage to Bering Sea was undertaken.

(*a*) *The testimony of one witness, A. G. Spexarth, was offered to prove a voyage to Bering Sea.*

Bearing in mind that this case, like all the sealing cases, involve large claims for damages, in which the chief witnesses are vitally interested in the outcome, what is the proof offered in the present case upon this projected voyage to Bering Sea?

The witness A. G. Spexarth testified that he was about one-quarter owner (Rec. p. 28); that the vessel was built and fitted out in 1891 (Rec. p. 29). As to the purpose of the voyage his testimony was that the vessel cleared from port of Astoria on a fur sealing expedition bound for Bering Sea (Rec. p. 27), and that the captain was instructed to proceed to Bering Sea (Rec. p. 27). Mr. Spexarth admitted to some confusion in his mind. He speaks on page 29 of the record of the vessel "entering the *fishing* enterprise in 1891". His precise testimony was:

> "Q. When did your vessel first enter commerce?
>
> A. Entered the *fishing* enterprise in 1891. Many of these dates I have in mind because of fires and different things; cannery wrecks and such things

as these; I have them in mind *but confuse the dates.*"

He did not go on the voyage and had never engaged in sealing himself. (Rec. pp. 30, 31). He showed inaccuracy in other respects. He says the vessel was "built" in 1891, (Rec. p. 29), whereas the register and certificate of title show that she was built in 1889 and sold in 1890 to the plaintiff corporation. The plaintiff did not produce in this case any shipping articles showing the voyage for which the crew signed on. No customs record was produced in court by the plaintiff in support of Mr. Spexarth's testimony that she cleared for Bering Sea; no manifests, or log book was introduced by the plaintiff. Plaintiff did not introduce in its behalf even the ordinary and customary record from the customs' books, showing when the vessel cleared, her tonnage, crew, and destination or purpose, and when she returned, as has been so frequently done in these sealing cases.* As far as the plaintiff's case goes, it must rest on the testimony of Mr. Spexarth and Mr. Spexarth alone to show the destination and object of her voyage.

(*b*) *The testimony of witness Spexarth was contradicted by the customs records which are evidence of destination.*

The plaintiff urges that the customs records introduced by the defendant are no evidence at all of the vessel's destination or intended voyage. Of course, if these are to be considered any evidence at all of desti-

*The court will observe the frequent references to such records in the cases reviewed in Bird v. U. S., 24 Fed. (2d) 933.

nation, then the case is simply one of conflict of evidence.

It is difficult for us to follow the basis of the argument that for the purpose of showing destination, or intent the customs records have no evidentiary value at all. Certainly the fact and language of the clearance and entry record and the first manifest give Sand Point as the vessel's destination; and certainly the second manifest shows an intent to proceed to Yokohama. Historically, a customs record of clearance has always been held to show destination. It has been called a ship's "passport".

Hamburg American Steam Packet Co. v. U. S., 250 Fed. 760 (CCA 2nd Cir.)

> "Clearances have a history in the maritime law extending over hundreds of years. A clearance is an important document, even in time of peace. It is particularly so in time of war. It certifies to the fact that a vessel has complied with the law and is authorized to leave port. It contains the name of the master, of the vessel, and of the port to which it is going. It bears an official seal and is a ship's passport, which entitles it to go from one end of the sea to the other, except that it cannot enter a blockaded port. Its regularity is the first thing that is inspected in time of war when the boarding officer of a belligerent vessel boards the ship to determine whether she is on a lawful voyage."

So it was held in

State of Oregon v. Ring, 259 Pacific 782 at 782

that records of clearances and entries were admissible in evidence as showing a vessel's destination.

> "Clearance papers are competent evidence of the destination of a vessel. The entry papers would likewise be evidence of the port from which the vessel came. 4 Jones on Evidence (2nd ed.) Sec. 701."

Plaintiff offers the testimony of Captain Dodge as an expert on customs laws to show that these records have no evidentiary value. The substance of Captain Dodge's testimony is that such a clearance might possibly be obtained by a vessel that intended to hunt seal on the high seas after leaving Sand Point; but that the seal fisheries in Bering Sea were in fact on the high seas and that the usual and customary clearance for a vessel intending to hunt fish on the high seas was a clearance for hunting and fishing, without stating a destination. This testimony, so far from supporting plaintiff's theory that the clearance is no evidence of intent or destination, is just the contrary. For if it is a fact that vessels intending to hunt seals in Bering Sea usually cleared merely for hunting and fishing, then the statement of a given port as an intended destination naturally gives rise to the inference that the stated port *is* her destination, and she is not to be taken as intending the customary roving voyage.

(*c*) *An intent to hunt seal elsewhere than in Bering Sea is consistent with the facts in evidence.*

Plaintiff argues that the only intent consistent with the other evidence in the case as to the "Bessie Rutter's" voyage is an intent to seal in Bering Sea. Substantially the same argument was made in various other sealing cases where there was a finding against

an intent to seal in Bering Sea. Because a witness testified as to an intent to seal in Bering Sea, it does not follow that the court is bound to accept that statement of intention exclusive of evidence that indicates otherwise. So in the present case, conceding that the plaintiff's one witness upon intent testified as to an intent to send the vessel to Bering Sea, the clearances and manifest show a voyage to Sand Point and a projected voyage thence to Yokohama. Plaintiff argues that the real voyage was into the Sea. But is that the only inference possible? Might not the court have inferred that the "Bessie Rutter" had in mind some other project? Sand Point seems to have been a rendezvous for ships south of the Aleutian Islands, outside of Bering Sea. Might not the court have inferred that the vessel was engaged in a coast voyage northward, (with which activities the government was not interested), following the seals to the Aleutian Passes, Sand Point being the furtherest point in a coast voyage? Examining the clearance from Sand Point to Yokohama, might not the court have inferred that there was some project for hunting seal on the Japanese coast down to Yokohama? There were, of course, known sealing grounds in Asiatic waters. The court will recall the historical fact that the season of 1891 was the sixth consecutive year in which the government restricted pelagic sealing in Bering Sea. For the five preceding years, government vessels had turned the pelagic sealers back at the Passes into Bering Sea. Might not the trial court have had this fact also in mind? Would not the clearance, manifests and entry record lend support to an inference of fact that

a voyage only to the Aleutians was projected? Notwithstanding the testimony of Mr. Spexarth, might not the court find the voyage was like that considered in Ladd v. U. S. (No. 5084) cited at page 7 of this brief?

Appellant's brief suggests some other explanation of these documents and some other reason why the vessel might have cleared from Sand Point to Yokohama. We would respectfully point out that these explanations appear in the brief, not in the record; they are the explanations given by counsel, not by witnesses on the stand; just as the explanation as to the customs' records is given by a witness testifying as an expert, not by a witness having a knowledge of the facts. The inferences which plaintiff says the court *might* have drawn do not exclude the inferences which the court in fact drew. The case is manifestly one in which certain documents and records were before the court, made thirty-five years *ante litem motam,* and which were to be considered in connection with all the other evidence in the case. The ultimate fact to be established was whether the plaintiff's vessel had undertaken and was engaged in a voyage to Bering Sea when she was boarded by officers from the "Thetis". The inferences to be drawn from the clearances, entry records, and manifests, were inferences of fact, and clearly required a process of weighing conflicting evidence. It was a process that was properly for a jury, or for the court, as a trier of facts, when sitting without a jury. See

Bird v. U. S., 24 Fed. (2d) 933 at 935

We submit that the finding of fact so made by the trial court should not be overturned by the court of appeal.

Appellant directs the court's attention to the fact that many other sealing vessels were warned by the "Thetis" and have recovered judgments against the government, (Appellant's Brief, pp. 17, 18), and urges this as a reason for giving appellant a judgment. The records in those cases are not before this court, and plainly those shipowners must have made proof of their cases to the satisfaction of the trial court, and got findings in their favor. It is no reason for reversing Judge Louderback's judgment to say that other shipowners in other sealing cases got judgments for damages—which is the substance of appellant's argument. Neither is it any argument for appellant's counsel to state their belief in the merits of the case. If that were an argument, cases would be won or lost according to the scale of vehemence with which an attorney pleaded his belief in his case.

(*d*) *The court of appeal has not heretofore passed upon the record now before it.*

On pages 1, 2 and 12 of plaintiff's brief, reference is made to the opinion rendered by this court when the first appeal was taken by plaintiff and new trial obtained. Plaintiff italicizes the language of this court wherein it is said that the "Bessie Rutter" cleared for a sealing expedition in the Bering Sea. Plaintiff's brief is somewhat ambiguous as to the record that was before this court in the first appeal. The manifests

and customs clearance and entry records (defendant's Exhibits 1, 2 and 3), were not in evidence at the first trial and were not before this court when the first appeal was considered. In the first appeal, there was, as this court pointed out, no contradictory evidence, and nothing to contradict the witness Spexarth. The statement of facts made by this court in its prior opinion could not have been made with reference to the present record.

III The Court of Appeal should not enter judgment in favor of appellant.

Appellant makes a last appeal to the court to order judgment to be entered directly in its favor, and thus save the labor of a new trial. Appellant calculates the damages at $16,870.50. Appellant has overlooked the testimony of their own witnesses that the crew of the "Bessie Rutter" was on a salary basis, as well as a lay. Plainly, if the crew would have been paid a flat wage, in addition to the lay, for each month of the voyage, as the witness Spexarth testified, (Rec. p. 33), there is no good reason for failing to allow a deduction of this amount from the judgment. An expense was saved which would otherwise have been incurred.

CONCLUSION.

The Sealing Claims cases form a class of cases by themselves, completely out of line with the ordinary case. The long lapse of time as a rule makes the plaintiff's case difficult to prove and the defense still more difficult. The plaintiff is and should be required to produce the best evidence and the best testimony

that is possible for him to produce. An especial value is to be attached to documentary records which were made many years prior to the Act of Congress enabling the claimants to sue.

In the present case, we submit that the finding of the trial court is amply supported by the evidence and should not be disturbed by the court of appeal.

Respectfully submitted,

GEO. J. HATFIELD,
United States Attorney,

ESTHER B. PHILLIPS,
Asst. United States Attorney,
Attorneys for Appellee.

May, 1929.

APPENDIX

DEFENDANT'S EXHIBIT NO. 1.

Coastwise Vessels Cleared. Date, 1891, March 17; Rig, Sch. Name: Bessie Rutter; Destination, Sand Point, Alaska; No. of tons, 30; Master, Olsen. Coastwise Vessels Entered. Date, 1891, July 20th; Rig., Sch.; Name, Bessie Rutter; Where from, Sand Point, Alaska; No. of tons, 30; Master, Olsen.

"I certify that the above are true and correct copies of the record of clearance and entry of the schooner Bessie Rutter, as taken from Volume 7 of the record of entries and clearance coastwise at the port of Astoria, Oregon on the dates above given.

Customhouse Astoria, Oregon, Aug. 23rd, 1928.
(Seal) (Signed) R. D. LAMB,
Deputy Collector in Charge."

(Endorsed): U. S. District Court, No. 17,341. Defendant's Exhibit No. 1. Filed 9/18/28, Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk.

DEFENDANT'S EXHIBIT NO. 2.

Coasting Manifest. Manifest of the cargo laden on board the Sch. Bessie Rutter, whereof H. Olsen is master; burden 30.33 tons, bound from Astoria, Oregon, for Sand Point, Alaska, Mar. 17, 1891. Packages and contents: 4 breech loading shotguns; 4 rifles; 30,000 wads; 21,000 primers; 6 kegs powder; 1 keg blasting powder; 21 sks. shot.

"Customhouse, Astoria, Oregon, Mar. 17, 1891.

This certifies that a bond has been taken in the sum of one thousand dollars to protect the United States regarding the violation of the laws governing trade with Alaska.

(Seal) (Signed) F. L. PARKER,
Dep. Collector."

"COASTWISE CLEARANCE PERMIT.

Customhouse, Port of Astoria, Mar. 17, 1891.

Henry Olsen, Master of the Sch. Bessie Rutter of Astoria, Oregon, having sworn as the law directs, to the within manifest, consisting of sundry articles of entry, and delivered a duplicate thereof, permission is hereby granted to the said vessel to proceed to the port of Sand Point, in the Terry. of Alaska.

Given under our hands at Astoria, Oregon, the day and year above mentioned.

(Seal) (Signed) F. L. PARKER,
Dep. Collector."

(Endorsed): 30. Olsen. Coasting Manifest Sch. Bessie Rutter for Sand Point, Alaska, Mar. 17, 1891. U. S. District Court, No. 17341. Defts. Exhibit No. 2. Filed 9/18/28. Walter B. Maling, Clerk, by A. C. Aurich, Deputy Clerk.

DEFENDANT'S EXHIBIT NO. 3
COASTING MANIFEST.

Gardner & Thornley
Ship and Custom Brokers
322 Washington Street

Manifest of the whole cargo on board the Schooner Bessie Rutter; Henry Olsen is master, burden 30.33 tons, bound from Astoria, Oregon, for Sand Point, Alaska, June 30th, 1891. Packages and contents: 4 breech loading shotguns; 4 rifles; 30,000 wads; 21,000 primers; 6 kegs of powder; 1 keg blasting powder; 21 sks. of shot; stores and ballast; 207 sealskins.

"This certifies that a bond has been taken in the sum of one thousand dollars to protect the United States regarding the violation of the laws governing trade with Alaska.

Henry Olsen, Master (or commander) of the schooner called the Bessie Rutter of Astoria, Oregon, do swear (or affirm) to the truth of this manifest, and that to my best knowledge and belief all the goods, stores and merchandise of foreign growth or manufacture, therein contained, were legally imported, and the duties thereupon have been paid or secured according to law.

(Signed) HENRY OLSEN.

Sworn to before me, this thirtieth day of June, 1891

(Signed) C. H. BULLARD,
Deputy Collector.
Port of Sand Point,
District of Alaska, July 1st, 1891.

Henry Olsen, Master of the schooner Bessie Rutter of Astoria, Oregon, having sworn as the law directs to the within manifest consisting of the sundry articles of entry and delivered a duplicate thereof, permission is hereby granted to the said vessel to proceed to the port of Yokohama in the State of Japan.

Given under by hand at—the date and year above mentioned.

(Signed) C. H. BULLARD,
Deputy Collector.

District and Port of

OATH OF MASTER TO MANIFEST ON ENTERING COASTWISE.

Henry Olsen, Master of the vessel called the Sch. Bessie Rutter, of Astoria, do swear that the manifest which I now exhibit contains a true account of the articles composing the whole cargo of the said Sch. which now are or at any time have been on board the said Sch. from the time of her departure from the port of Sand Point, A. T., from whence she first sailed, except.....and that no part thereof has been landed therefrom excepting.....

(Signed) HENRY OLSEN,
Port of Astoria, Oregon.

Sworn and subscribed before me this 20 day of July, 1891.

(Signed) F. L. PARKER,
Dep. Collector."

(Endorsed): "30. Olsen. Coasting Manifest. Schooner 'Bessie Rutter'. Owner, Olsen, Master. From

Sand Point, A. T., Jul. 20, 1891. U. S. District Court, No. 17,341. Defts. Exhibit No. 3. Walter B. Maling, Clerk. By A. C. Aurich, Deputy Clerk. Gardner & Thornley, Ship and Customhouse Brokers, 322 Washington St., San Francisco, Cal."

No. 5745

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC HUNTING AND FISHING COMPANY, an Oregon corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

J. N. GILLETT,
H. H. NORTH,
Merchants Exchange Bldg., San Francisco,
Attorneys for Appellant.

Parker Printing Company, 523 Clay Street, San Francisco

No. 5745

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PACIFIC HUNTING AND FISHING COMPANY, an Oregon corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S REPLY BRIEF.

Counsel for defendant in their brief contend that the judgment of the lower court should be affirmed because as they say on page 9 of their brief:

> "The proof in the present case supports the finding of the trial court that no voyage to Bering Sea was undertaken,"

and, on page 14 of their brief, counsel say:

> "The ultimate fact to be established was whether the plaintiff's vessel had undertaken and was engaged in a voyage to Bering Sea when she was boarded by officers from the Thetis."

This ultimate fact was proven by the uncontradicted and unimpeached testimony offered by plaintiff.

There is no question but that the Bessie Rutter was on a sealing voyage no matter what port in Alaska she cleared for when she left Astoria, Oregon.

The witness Spexarth, who was the managing owner, gave the following testimony:

> "Our company built the schooner for sealing. On March 17th she cleared from the Port of Astoria on a fur-sealing expedition bound for Bering Sea. Her Master was Henry Olsen and *I instructed him that he was to go sealing in Bering Sea.*" (Trans. 28.)

On cross-examination he gave the following testimony:

> "Q. Were you managing the vessel?
> A. I was managing the vessel on shore, but I was not aboard.
> Q. Did you issue instructions to the master as to where he was to go and what he was to do?
> A. Yes, sir.
> Q. Was that part of your shore management?
> A. Yes, sir.
> Q. What did you instruct the Captain to do?
> A. The Captain was instructed to proceed to Bering Sea and had all the things that were necessary to prosecute the voyage."

Mr. Spexarth gave the same testimony at the trial before Judge Bourquin and this Court in passing on the appeal from Judge Bourquin's decision, said, referring to the voyage of the Bessie Rutter:

> "She cleared from Astoria March 17th, 1891, for a sealing expedition in the Bering Sea; at least such were the instructions of the owner to the master. Thereafter, on June 29th, 1891, and

> before she reached Bering Sea the schooner was boarded by Naval officers who delivered to the master a copy of the proclamation together with warning. She did not go into Bering Sea and returned to port in July. There was no contradictory evidence and nothing to impeach Spexarth."
>
> 24 Fed. Rep. 2nd Series, 938.

And in this case there is "nothing to impeach Spexarth". But defendant's counsel in their brief claim that Mr. Spexarth's testimony was contradicted by the Custom records showing that the Bessie Rutter cleared from Astoria, destination Sand Point, Alaska. Said record does not show that it was not the intention of the plaintiff to go to Bering Sea and hunt for seal. It simply shows the first port where the Bessie Rutter on her voyage was to touch. It doesn't prove the end of the voyage and it doesn't prove that the voyage was not to embrace the waters of Bering Sea, and doesn't disprove or contradict in the least the testimony given by Mr. Spexarth, managing owner of the Bessie Rutter that he instructed the master to go to Bering Sea and hunt seal.

Captain Dodge, of the U. S. Coast Guard Service, was called as an expert witness and gave the following testimony:

> "Q. What would be the significance of a schooner, sailing schooner, clearing from Astoria for Sand Point, Alaska, the vessel being a registered vessel?
>
> A. That would signify that Sand Point, Alaska, would be her first point of call; she would

touch there first after leaving Astoria; if the vessel was going to proceed from there she would clear from there for another port wherever she chose to go and obtain clearance papers there."

Then the Court interrogated the witness as follows:

The COURT. In other words, it is put under a legal obligation to go to the port to which it has cleared? A. To which it has cleared.

Q. Having accomplished that it is under no obligation to go to any particular place?

A. No; after that when she arrives at that port the law compels her to enter the vessel there, and if he does not report to the Collector of Customs her arrival there inside of 24 hours she is subject to a fine; if he is trading he may obtain cargo there for the next port. Or he may go to another cargo port. Or *he may go whaling or hunting.*

Q. Is there any other significance than that Sand Point was their first point of touching?

A. Only that she cleared for that point and he would be under the duty of going to that port and presenting her clearance or ship papers."

(Transcript 46-47).

If, after the Bessie Rutter presented her clearance papers at Sand Point she could lawfully go hunting anywhere in Bering Sea how can the Court, from that fact, draw the inference that the owners of the Bessie Rutter never intended a sealing voyage into Bering Sea when she cleared from Astoria. Being especially built for sealing and fishing purposes and being fully equipped for hunting seal and not fit for any other business is it not unreasonable to suppose that she would sail for Sand Point and after arriving there

turn around and come home without going to the well-known hunting grounds in Bering Sea?

Captain Dodge was shown the clearance papers of the Bessie Rutter and was asked the following question:

> "Q. But this (showing plaintiff's Exhibit, the clearance for Sand Point) would be a perfectly proper paper for a vessel that was intending to hunt seal in the Bering Sea? A. Yes, sir."

If this was a "proper paper for a vessel that was intending to hunt seal in the Bering Sea" how can the Court draw an inference therefrom that the owners of the Bessie Rutter never intended a sealing voyage to Bering Sea when the managing owner testified that the voyage was for Bering Sea and that he instructed the Master of the Bessie Rutter to go to Bering Sea and hunt for seal. If there was no evidence in the case other than the clearance papers, then the Court could readily find that the vessel's destination was for Sand Point only, but when the promoters of the voyage testify that the vessel was sent to Bering Sea to hunt seal, and when Government maps offered in evidence show that it was engaged in sealing and following the seal herd and warned from going into Bering Sea by the Government we submit that the only fair, just and reasonable deduction that can be made is that the Bessie Rutter was on a sealing voyage to Bering Sea and was prevented from going there by defendant's gunboats and this presumption cannot be overcome by an inference drawn from its clearance papers espe-

cially when they permit a voyage to Bering Sea.

Sec. 4358 of the U. S. Revised Statutes is as follows:

> "The Coasting trade between the territory ceded to the United States by the Emperor of Russia and any other portion of the United States shall be regulated in accordance with the provisions of law applicable to such trade between any two great Districts."

In 1891 and prior thereto and until 1892 the United States claimed exclusive jurisdiction over all that portion of the Bering Sea inclosed within the boundaries of Alaska as ceded by Russia of which the Court will take judicial notice.

The Bessie Rutter in clearing from Astoria, Oregon, to Sand Point, Alaska, was proceeding from one great Customs District to another and under Article 203 of the Treasury Department regulations, Document No. 552, adopted July 1st, 1884, was obliged to have a manifest.

Having reached Sand Point the Bessie Rutter under the law and rules and regulations of the Treasury Department had the right, without clearing from Sand Point, to hunt anywhere in the Alaskan waters including Bering Sea these waters being in the Alaskan Great District.

> "A vessel of 20 tons burden or upwards licensed for the coasting trade, bound from one collection district to another within the same great coasting district * * * in ballast, or having on board goods, stores or merchandise, etc., * * * may proceed from one place to another within the limits afore-

said without delivering a manifest thereof, or obtaining from any officer of the customs a permit to depart."

The same rule applied to registered vessels such as the Bessie Rutter under Section 4261, Revised Statutes.

This rule was also laid down by the Treasury Department in its decision No. 4498 of April 19, 1880, addressed to the Collector of Customs, Georgetown, D. C., and reading in part as follows:

> "In a communication to the Department of the 8th instant you inquired whether under the Regulations of the Circular of the Department of June 27, 1879, American vessels under register and engaged in the coasting trade, may enter from one port to another without entering or clearing. You are informed that by the circular in question registered vessels engaged in the coasting trade are divided into two classes: First, such as are laden with excesses of the commodities specified in Sections 4349, 4351 and 4359 Revised Statutes. Such registered vessels will enter and clear in every marine customs district.
>
> "Second: Such as are either in ballast, or not laden with excesses of those commodities (vide Bessie Rutter) are obliged to enter and clear *only* when making a trip *other* than from a marine district in one State to a similar district in the same or an adjoining State."

Articles 208 of the same Regulations reads in part as follows:

> "The master of every vessel of the burden of 20 tons or upwards licensed for the coasting trade,

> bound from one to another great coasting district * * * * must, previously to its departure deliver to the Collector residing at the port * * * * duplicate manifests of the cargo on board such vessel, to which he must make oath or affirmation according to Form 58, R. S. 4353. If there be no cargo or lading other than sea stores on board such vessel, the master or commander must make oath or affirmation that such is the case. The collector * * * * will then certify the manifests, and grant a permit as in the preceding case."

Article 179 of the present customs regulations, edition of 1923, Treasury Department Document No. 2924, reads in part as follows (Italics ours):

> "Vessels duly licensed as vessels of the United States and entitled to engage in the coasting trade, may proceed from port to port, or from place to place within the same great district, however laden, or in ballast, *without reporting their departure or arrival at the custom house,* unless carrying bonded merchandise in which event they shall enter and clear. All vessels engaged in the coasting trade proceeding between ports in *different great coasting districts must enter and clear."*

It thus becomes apparent that when the Bessie Rutter cleared for Sand Point, Alaska, and duly entered at that customs station, it was entitled to carry on its trade anywhere within that great customs district, which the Government contended at that time included all the waters of Bering Sea, without further clearance or permit, and to hold that the Court is entitled to draw the deduction from the marine documents that Sand Point was an ultimate destination,

is an inference entirely unsupported by law and by the evidence.

II.

After the conclusion of the trial, and after counsel for defendant raised the point that the Bessie Rutter, as shown by its clearance papers only intended a voyage to Sand Point and not to Bering Sea, plaintiff asked permission to take further testimony on that point, it being the first time it was raised, which was granted and a stipulation was entered into to take the depositions of Mr. Spexarth and Sam Freeman, who were both owners of the Bessie Rutter and interested in its voyage. On November 16th, 1928, their depositions were taken in Portland, Oregon. In his deposition Mr. Spexarth gave the following testimony:

"Q. Now you say the schooner was bound for Bering Sea? A. Yes.

Q. Where did she clear for? A. Sand Point.

Q. Sand Point, where?

A. Sand Point, Alaska.

Q. Why did she clear for Sand Point, Alaska?

A. Well, she cleared for Sand Point, Alaska, because those were instructions from the Astoria Custom officers that she had to clear for Sand Point or for some point other than in this Custom's district and in accordance with the instructions I cleared her for Sand Point. (Page 4 of Deposition).

Q. Do you have any recollection of the fact of making the clearance? A. Yes.

Q. What is that?

A. Well, chiefly the instructions of Mr. Parker, the collector or chief deputy that this had to be complied with. When the vessel leaves one

great custom district it had to enter into some other.

Q. Now did the Bessie Rutter have any cargo for Sand Point? A. No; no cargo of any kind.

Q. What did she carry?

A. She carried nothing but her stores, arms, and ammunition and a net; the fish net to be used in Bering Sea catching seals with a net."

(Page 5 of Deposition).

On cross-examination Mr. Spexarth gave the following testimony:

"Q. Mr. Spexarth, you said that when the vessel cleared, you had some talk with the custom officer at Astoria about clearing her, and that he said in going from one customs district to another you should clear for some particular point?

A. Yes that was the requirement.

Q. Did you have any discussion with him about whether or not Bering Sea would be open to seal hunters at that season?

A. No, I don't think that we did; no not in particular.

Q. You say, 'Not in particular'; just what was said.

A. Well the conversation was that he was going sealing and the destination was to Bering Sea, and then Mr. Parker said: 'You have got to enter at some custom house, because when you go to Alaska you are leaving this great custom district,' and that made him clear for Sand Point."

(Page 16-17 of Deposition).

This fully explains how the Bessie Rutter happened to clear for Sand Point.

Sam Freeman in his deposition gave the following testimony:

"Q. What connections if any did you have with the schooner Bessie Rutter.

A. I had an interest in her.

Q. Do you know who built her?

A. The builder was John Rutter.

Q. But the parties who built her?

A. Henry Olson, Theodore Bracker, Mr. Spexarth and myself.

Q. Did you afterwards have stock in the Pacific Hunting and Fishing Company, a corporation? A. Yes sir I did.

Q. Did the company own the Bessie Rutter after she was built? A. Yes.

Q. Now do you remember why you built the Bessie Rutter? A. For sealing at Bering Sea.

Q. Do you know when she left Astoria?

A. I am not sure, it was so long ago.

Q. We will put it this way: When she left Astoria in 1890 or 1891, do you know where she was bound for? A. Bering Sea.

Q. What for? A. Sealing."

The testimony of Mr. Spexarth shows the reason why the Bessie Rutter was cleared for Sand Point. The Custom officer said it had to clear for that place and following his advice and instructions the vessel was so cleared.

The Court denied plaintiff's motion to open the case to receive this evidence and ordered that findings be entered in defendant's favor to which plaintiff duly excepted.

Among the assignment of errors printed in the Record we quote the following:

"VIII

The Court erred in rejecting plaintiff's petition for a rehearing and resubmission of the case,

and in not exercising a sound judicial discretion by permitting a reopening of the case for the introduction of further testimony which had already been taken by deposition on stipulation in order to avoid a miscarriage of justice."

"IX

The Court erred in denying plaintiff's motion to withdraw, vacate and set aside its opinion rendered in defendant's favor on October 29th, 1928, and in place thereof to give judgment to plaintiff upon the ground that the uncontradicted evidence in the case established plaintiff's right to a judgment in its favor to which ruling plaintiff duly excepted and which exception was allowed by the Court."

After these motions were made and denied findings were made by the Court and a judgment was ordered to be entered in defendant's favor.

The depositions of Mr. Spexarth and Mr. Freeman taken in November, 1928, were submitted to the Court by plaintiff in its proposed bill of exceptions, and were not allowed by the Court and ordered to be stricken therefrom. We will ask to have the Clerk of the District Court send these depositions to the Clerk of this Court and respectfully ask that in passing upon this appeal they may be considered and treated as a part of the record on appeal.

The testimony therein contained clearly shows that the managing owner of the Bessie Rutter wanted to clear the Bessie Rutter for a hunting voyage to Bering Sea and was prevented from doing so by the Collector of Customs who informed him that he must clear

for Sand Point, the Custom House in that great district. As we have shown such clearance was correct for a voyage to Bering Sea and to permit a matter of this kind to defeat plaintiff's cause of action for damages suffered by the action of the defendant in interfering with the voyage of the Bessie Rutter would be a miscarriage of justice and for that reason the decision of the Court should be reversed and plaintiff given an opportunity to offer said depositions in evidence.

III

We have asked in our opening brief that in reversing the decision of the lower court that it be directed to enter a judgment in favor of plaintiff in the sum of $16,870.50.

Counsel in their reply brief object to this and say:

> "Appellant has overlooked the testimony of their own witnesses that the crew of the Bessie Rutter, was an a salary basis, as well as a lay. Plainly if the crew would hve been paid a flat wage in addition to the lay, for each month of the voyage, as the witness Spexarth testified, (Rec. p. 33) there is no good reason for failing to allow a deduction of this amount from the judgment."

Counsel must have overlooked the decision of the case of the United States v. Laflin, reported in Vol. 24 Fed. Rep. 2nd Series, 683, also in United States v. Peterson, 28 (2nd) Fed. 29. In cases of this kind it is the duty of the owners of the vessels to bring

an action for damages and may recover for the full amount, but when recovered they hold the same in trust for the payment of the wages and lays of the officers and members of the crew which they would have earned had the voyage been completed. This point has been raised in a number of the so-called sealing cases and in each one it has been decided that the owners of the vessel may maintain in their own name, without joining with them members of the crew, and recover full damages.

From any judgment which plaintiff may recover in this action it must pay to the officers and members of the crew of the Bessie Rutter or their legal representatives the wages they would have received had the voyage not been interfered with. The lay which they were to receive is treated as wages only, as decided by the Laflin and Peterson cases and the many decisions referred to in the opinion of the Court.

In conclusion, we respectfully submit that the plaintiff is entitled under the Act of June 7th, 1924, to recover a judgment against defendant for damages suffered because of its interference with the sealing voyage of the Bessie Rutter.

The uncontradicted evidence shows that the Bessie Rutter was built to be used for hunting and fishing and was suitable for no other purpose; that on the 17th day of March, 1891, it cleared from Astoria, Oregon, for a sealing voyage to Bering Sea where the seal herd were alone to be found from the 1st of July to the middle of September, and while on its voyage on the 29th day of June, 1891, she was boarded by an

officer from the U. S. S. Thetis who served a warning on the master of the Bessie Rutter not to enter Bering Sea to hunt for seal, and the master of the Bessie Rutter complied therewith and returned to Astoria, the home port. It is also conclusively shown by the testimony of Captain Fredrick Dodge of the United States Coast guard survey that the clearance papers of the Bessie Rutter were proper papers for a sealing voyage into Bering Sea, which fact is also shown by Statutes of the United States, and Government regulations hereinbefore referred to, and this being true, and no evidence having been offered to contradict it, the Court should have found that the voyage of the Bessie Rutter was intended for sealing in the Bering Sea, and there was nothing in the evidence to justify or warrant its findings that said vessel did not intend to hunt there.

As discussed in our opening brief, after the interference the vessel cleared for Japan, but afterwards gave up the voyage and returned home, no doubt because the master learned that there was no place where seal could be successfully hunted after the first of July outside of the Bering Sea.

But for this interference there can be no doubt or question but that its master would have followed the instructions given to him to go to Bering Sea where he would have been certain to make a successful catch.

Respectfully submitted,

J. N. Gillett,
H. H. North,
Attorneys for Appellant.

No. 5745

IN THE 8

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

PACIFIC HUNTING AND FISHING COMPANY, an Oregon corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE IN ANSWER TO APPELLANT'S REPLY BRIEF

GEO. J. HATFIELD,
United States Attorney,

ESTHER B. PHILLIPS
Asst. United States Attorney
Attorneys for Appellee.

Neal, Stratford & Kerr, S. F.

No. 5745

IN THE

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FOR THE

NINTH CIRCUIT

PACIFIC HUNTING AND FISHING COMPANY, an Oregon corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE IN ANSWER TO APPELLANT'S REPLY BRIEF

I.

Appellant's reply brief, pp. 1-9, quotes the various statutes and treasury department regulations relating to the steps by which a registered or enrolled vessel may proceed from one customs district to another, and the papers to be taken out in connection therewith. We think that our opening brief covered the subject. If the "Bessie Rutter's" actual destination was in fact Sand Point, then clearances, manifests, permits, etc., were required, for it was a case of a vessel trading between or going from one district to another. If, however, she were bound for the high seas, then the sta-

tutes would not cover such a voyage, for the high seas are not within a customs district of the United States. In the present case, the clearances and permits show that Sand Point was her destination; and the testimony of Captain Dodge as well as the statutes, etc., shows that vessels bound for fishing on the high seas were not required to get such papers, and did not ordinarily so do.

II

Pages 9-13 of appellant's reply brief quotes and relies on matters not contained in the Bill of Exceptions, and which are not a part of the record in this case and to which appellant's opening brief contained no reference.

The court will observe that this case was tried September 18, 1928, was submitted on briefs, and on October 29, 1928, the court having fully considered the case, ordered that judgment be entered in favor of the defendant (rec. p. 52). It was not a snap judgment on the part of Judge Louderback and the appellate court may surmise that the case was comprehensively briefed and was carefully considered by the court, as is indicated by the lapse of time between the submission and the decision. Thereafter and on December 10, 1928, the appellant asked for a rehearing. (Rec. p. 53) During the interval, by stipulation, depositions were taken of A. G. Spexarth and Sam Freeman. This was the third time Mr. Spexarth had testified. Plaintiff had not previously called Mr. Freeman as a witness, although his name and address were known (Rec. p. 28).

Of course the taking of testimony to perpetuate the same, pending an appeal, is proper, and the mere fact of taking such depositions would not prejudice the opposing party, in whose favor a judgment had been rendered. The petition for a new trial or a rehearing, came on for hearing on December 22, was argued, and submitted on briefs. The defendant made an objection to the introduction in evidence of the last deposition on the ground that no showing had been made by the appellant "of legal reason, accident, or surprise, etc." to explain why the evidence now offered had not been discovered earlier (Rec. p. 57). The point was argued and submitted on briefs. The objection was sustained by the court on January 10, 1929, and the court signed the findings in favor of the defendant (Rec. p. 57).

The Bill of Exceptions as made up shows these proceedings, but it does not incorporate the depositions of Spexarth and Freeman taken as in November, 1928, which the court had refused to read or consider. It did incorporate the two earlier depositions of Mr. Spexarth. As the case stood, the obligation was on the plaintiff in that case, (now the appellant), to make a showing to the District Court, such as to convince that court that it should set aside the ruling theretofore made. In other words, the plaintiff's first objective was to show to the trial court, good and sufficient reasons in law, why, after the case had been tried, briefs filed, the case submitted to the court for decision and the court rendered its decision, the plaintiff should then have the decision set aside and a second

opportunity to retry the issues. Had this case been tried before a jury, there can be no question as to the obligation upon the plaintiff to make a proper showing to the court, there could be no argument but that the plaintiff was bound to make an adequate showing of surprise, or other sound legal reason, or mistake, which would move the court to set aside the verdict of a jury. The trial court was in exactly the same position as the jury. If the plaintiff was bound to make an adequate showing for setting aside a jury's verdict and thus cause a duplication of trials, the same holds true for the court, for surely the court's time is not to be deemed of less value than a jury.

We submit that the record before this court shows that no preliminary showing was made by the plaintiff. In order for the trial court to open the depositions and read them it was incumbent upon the plaintiff to make a proper showing to move the court to open the record. The tender of further testimony from a witness who had already testified twice in the case forms no exception. The court might well look askance at such testimony and require adequate showing. No such showing was made, and the court sustained the objections of the defendant to allow a retrial and further evidence to be introduced.

The foregoing states the substance of the proceedings. Appellant's second and reply brief quotes from and relies on the third deposition of Mr. Spexarth, and the deposition of Mr. Freeman, as a ground for reversal of the trial court. These depositions were not in the Bill of Exceptions and form no part of the

record of the case. An application for a rehearing or a new trial was discretionary with the trial court and the grant or refusal is not ground for reversal. Nor can the substance of testimony which an appellant may have expected to offer in evidence in the event of a new trial be the basis of reversing a case already tried.

III.

THE AUTHORITIES.

An application for a rehearing rests in the discretion of the trial court. The grant, or refusal, is not a subject of appeal.

Foster, Federal Practice and Procedure, Vol. 2 (sixth ed.) p. 2176;

Roemer v. Neumann, 132 U. S. 103, 33 L. Ed. 277.

"After the case had been heard and decided upon its merits, the plaintiff could not file a disclaimer in court, or introduce new evidence upon that, or any other subject, except at a rehearing granted by the court, upon such terms as it saw fit to impose. The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the case has been heard or tried, and is not the subject of appeal."

Pickett v. United States, 216 U. S. 456.

"There are a number of errors assigned. The first and tenth are for error in denying a new trial. The granting or denying of a new trial is a matter not assignable as error."

Batty Brokerage Co. v. Gulf etc. Ry., 17 Fed. (2d) 480 at 481 (C. C. A. 5th).

"On the other error assigned, it is elementary that in federal courts the granting or refusal of a new trial is within the sound discretion of the trial court, and error cannot be predicated thereon."

Cudahy Packing Co. v. City of Omaha, 24 Fed. (2d) 3 at pp. 7, 8 (C. C. A. 8th Cir.);

Holmgren v. United States, 217 U. S. 509, 54 L. Ed. at 867.

"It has been frequently decided that the allowance or refusal of a new trial rests in the sound

discretion of the trial court, and its action in that respect cannot be made the basis of review by writ of error from this court."

National Bank of Commerce v. United States, 224 Fed. 679 at 683, (C. C. A. 9th Cir.)

"No error is asssignable from a denial of a motion for a new trial. Pickett v. United States, 216 U. S. 456. And that the motion is based upon newly discovered evidence does not constitute an exception. Holmgren v. U. S., 217 U .S. 509."

American Trading Co. v. North Alaska Salmon Co., 248 Fed. 665 at 670 (C. C. A. 9th Cir.)

"It is suggested that the court below erred in not setting aside the verdict and ordering a new trial. It is well settled that in the United States courts the refusal of the trial judge to set aside a verdict and grant a new trial is not subject to review."

The showing made for grant of a new trial or of a rehearing was entirely insufficient.

Foster, Federal Practice (6th ed.) p. 2174.

"The petition for a rehearing should state fully the facts which show the nature of the new evidence, the facts which show that it could not have been found by the exercise of reasonable diligence before the hearing, that it was not known then, and that a diligent search was previously made for the evidence. These general averments of reasonable diligence and previous ignorance are insufficient."

A leading case upon the "discovery" of evidence is Wood v. Carpenter, 101 U. S. 135, 25 L. Ed. at 808:

"A general allegation of ignorance at one time and of knowledge at another, is of no effect. If the plaintiff made any particular discovery, it should be stated when it was made, what it was, how it was made, and why it was not made sooner."

Sun Life Assur. Co. v. Budzinski, 25 Fed. (2d) 77 at 78 (C. C. A. 3d. Cir.)

> "We are of opinion that the application does not show the testimony now regarded as newly discovered was not by proper diligence available at the trial, *and therefore the application fails to show that legel requisite for the allowance of such a motion.*"

Where the "newly discovered evidence" consists of a witness examined at the trial, the rule is strict.

46 Corpus Juris, 259.

> "A new trial will not be granted to permit a witness to testify to facts forgotten, or overlooked by him, or to which attention was not called, when giving his testimony at the trial. That the witness is better able to testify from having refreshed his memory or that memoranda have been found to refresh his memory and make his testimony more positive, does not change the rule. The case must be a very strong one indeed which will justify a new trial on the ground of newly discovered evidence, where the witness was in fact used upon the trial of the case. Legal diligence requires that a witness be examined fully and specifically as to his knowledge of all the matters in controversy. The rule applies to witnesses whose testimony is taken in the form of depositions."

The cases are fully cited in support of the foregoing rule.

For other cases showing the legal prerequisites to grant of a new trial on the ground of newly discovered evidence, see

Silva v. Reclamation District, 41 Cal. App. 326;
Estate of Cover, 188 Cal. at pp. 149-150;
Pollard v. Burger, 55 Cal. App. at 83.

CONCLUSION.

It would seem apparent that the appellant has made a direct attempt to have this court pass on evidence not in the record. We stand upon the record. The evidence was in fact in conflict and the judgment of the trial court should be affirmed.

GEO. J. HATFIELD,
United States Attorney,

ESTHER B. PHILLIPS
Asst. United States Attorney,
Attorneys for Appellee.

Dated: May 16, 1929.

No. 5746

United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK ALVAU and HUMBERT ROSSI,
Appellants,

vs.

UNITED STATES OF AMERCIA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5746

United States

Circuit Court of Appeals

For the Ninth Circuit.

FRANK ALVAU and HUMBERT ROSSI,
Appellants,

vs.

UNITED STATES OF AMERCIA,
Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

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(Wash. 8647)

United States District Court, Western District of Washington, Northern Division.

May, 1928, Term.

No. 12,622.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK ALVAU, *alias* FRANK ALVO, and HUMBERT ROSSI,
Defendants.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

INDICTMENT.

Vio. Secs. 3266, 3281, and 3282, R. S.

United States of America,
Western District of Washington,
Northern Division,—ss.

The grand jurors of the United States of America, being duly selected, impaneled, sworn and charged to inquire within and for the Northern Division of the Western District of Washington, upon their oaths present: [2]

COUNT I.

That FRANK ALVAU, *alias* FRANK ALVO and HUMBERT ROSSI, on or about the twelfth day of July, in the year of our Lord one thousand nine hundred and twenty-eight, about one mile southeast of Redondo, King County, Washington, and at certain premises known as the Frank Alvau premises, in the Northern Division of the Western District of Washington, within the jurisdiction of this Court and within the Internal Revenue Collection District of Washington, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously make and ferment, approximiately, one thousand (1000) gallons of a certain mash, wort, or wash, fit for distillation of spirits, in a certain building, to wit, the residence of the said Frank Alvau, not then and there a distillery duly authorized according to law; contrary to the form of the statute in such case made and pro-

vided, and against the peace and dignity of the United States of America. [3]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT II.

That FRANK ALVAU, *alias* FRANK ALVO and HUMBERT ROSSI, on or about the twelfth day of July, in the year of our Lord one thousand nine hundred and twenty-eight, about one mile south-east of Redondo, King County, Washington, and at certain premises known as the Frank Alvau premises, in the Northern Division of the Western District of Washington, within the jurisdiction of this Court, and within the Internal Revenue Collection District of Washington, then and there being, did then and there knowingly, willfully, unlawfuly, and feloniously use a certain still for the purpose of distilling spirits, in a certain dwelling-house, to wit, the dwelling-house of the said Frank Alvau located on the said premises; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [4]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

COUNT III.

That FRANK ALVAU, *alias* FRANK ALVO and HUMBERT ROSSI, on or about the twelfth day of July, in the year of our Lord one thousand nine hundred and twenty-eight, about one mile south-east of Redondo, King County, Washington, and at

certain premises known as the Frank Alvo premises, in the Northern Division of the Western District of Washington, within the jurisdiction of this court, and within the Internal Revenue Collection District of Washington, then and there being, did then and there knowingly, willfully, unlawfully, and feloniously carry on the business of a distiller of spirits, without having given bond as required by law; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ANTHONY SAVAGE,
United States Attorney.
PAUL D. COLES,
Assistant United States Attorney.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open court, in the Presence of the Grand Jury, and Filed in the U. S. District Court Sep. 21, 1928. Ed. M. Lakin, Clerk. By S. E. Leitch, Deputy. [5]

[Title of Court and Cause.]

ARRAIGNMENT AND PLEA (FRANK ALVAU).

Now, on this 1st day of October, 1928, defendant Frank Alvau comes into open court for arraignment and answers that his true name is Frank Alvau. He waives an attorney and enters his plea of not guilty. Said cause is set for November 19, 1928, for assignment.

[Title of Cause.]

ARRAIGNMENT AND PLEA (HUMBERT ROSSI).

Now, on this 1st day of October, 1928, defendant Humbert Rossi comes into open court for arraignment and answers that his true name is Humbert Rossi. He waives an attorney and enters his plea of not guilty. Said cause is continued to November 19, 1928, for assignment.

Recorded in Journal No. 16, at page 326. [6]

[Title of Court and Cause.]

PETITION TO SUPPRESS EVIDENCE.

Comes now the defendant, Frank Alvau, and petitions the Court to suppress the things and articles seized at the residence and home of the said petitioner and his wife and family, at Redondo, in the County of King and State of Washington, for the reasons and upon the grounds:

I.

That your petitioner, on or about and prior to the 12th day of July, 1928, and also subsequent thereto, resided with his family on a ranch of 14 acres, consisting of a private dwelling-house, which was his residence at the time of the unlawful search and seizure complained of in this proceeding, and the private dwelling-house of the said petitioner was searched, and an unlawful seizure made there-

from, without a search-warrant, and without any warrant whatsoever, or authority of law, under the following facts and circumstances:

That the prohibition agents in the night-time, on the said 12th day of July, 1928, at about three A. M. o'clock, without a search-warrant, and without any warrant whatsoever, and without authority of law, battered down the door of the private dwelling-house of the petitioner and his said family, breaking the door-sill and the lock that securely fastened the same, and without due process of law or any legal authority whatsoever, unlawfully and wrongfully entered [7] the private dwelling-house of your petitioner and his family, and proceeded to search the said private dwelling-house, stating to your petitioner that they were prohibition agents, and upon being requested for their authority and a search-warrant, if any they had, by your petitioner, they stated that they did not need a search-warrant but had a right to search without any warrant whatsoever.

That thereafter the said search continued for a period of nearly five hours, and during said period the said officers moved about the personal belongings of the said petitioner in the said premises, and unlawfully and illegally searched and seized certain articles without any search-warrant whatsoever, and in violation of the constitutional rights of your petitioner under the Fourth and Fifth Amendments to the Constitution of the United States, and in violation of Article I, Sections 6 and 9, of the Constitution of the State of Washington, guarantee-

ing a person against unlawful search and seizure in his home.

II.

That the said search and seizure were illegal and unlawful in that the same were an invasion of the constitutional rights and privileges of the said defendant, in that the search was made in the nighttime, and further, in that the said agent executing the said search was not an Internal Revenue Officer, but was a deputy or assistant Federal Prohibition Agent, unauthorized to make a search and seizure without due process of law.

III.

That the said search and seizure were in violation of the constitutional privileges of your petitioner, contrary to the provisions of the Constitution of the United States, and the constitution of the State of Washington. [8]

IV.

That no business of any kind is transacted or carried on in petitioner's said dwelling-house, by petitioner, and no intoxicating liquor is unlawfully sold thereon, and the said dwelling-house is occupied and used solely as a private dwelling, by petitioner and his family.

V.

That there was no affidavit or complaint upon which a lawful and valid search-warrant could issue, showing that intoxicating liquor containing more than one-half of one per cent by volume, and fit for use for beverage purposes, was unlawfully

possessed in the said dwelling-house or by your petitioner, and that there was no complaint or affidavit which set forth facts upon which probable cause for belief that such intoxicating liquor was so possessed or could be found.

VI.

That there was no complaint or affidavit whatsoever containing a statement of facts upon which the existence of probable cause for the issuance of a warrant could be found.

VII.

That there was no complaint or affidavit describing the premises directed to be searched, or any search-warrant whatsoever, and the said premises were not particularly and definitely described in any search-warrant directed against said premises. That there was no search-warrant executed by a person to whom it could have been directed.

VIII.

That without any warrant whatsoever, a private dwelling-house in which intoxicating liquor was not unlawfully sold was searched. [9]

WHEREFORE, your petitioner prays that the said articles so seized, and all of the evidence derived or gained from said unlawful search and seizure, be suppressed, and that the District Attorney and the Federal Prohibition Agents be restrained from making any use of the things found and the information gained as a result of said search, and

for such other and further relief granted to your petitioner as to this Court may seem just.

JOHN B. WRIGHT,
EDWARD H. CHAVELLE,
Attorneys for Defendant.
315 Lyon Building, Seattle, Washington. [10]

United States of America,
Western District of Washington,
Northern Division,—ss.

Frank Alvau, being first duly sworn, on oath deposes and says: That he is the petitioner named in the foregoing petition to suppress evidence; that he has read the said petition, knows the contents thereof, and believes the same to be true.

FRANK ALVAU.

Subscribed and sworn to before me this 17th day of July, 1928.

[Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Sep. 28, 1928. [11]

[Title of Court and Cause.]

AFFIDAVIT OF FRANK ALVAU IN SUPPORT OF PETITION TO SUPPRESS EVIDENCE.

United States of America,
Western District of Washington,
Northehrn Division,—ss.

Frank Alvau, being first duly sworn, on oath de-

poses and says: That he is one of the defendants above named; that he resides at Redondo, in King County, State of Washington, on a ranch where he resides with his wife and children, and which said home he is purchasing on a real estate contract; that the said dwelling-house consists of six rooms and basement, and is located on about 14 acres of ground about 1200 feet from the highway nearest adjacent to said property, and that *there* resided there on the 12th day of July, 1928, and for a period of more than two years prior thereto and subsequent thereto, the said affiant and his wife and children; that on the said 12th day of July, 1928, in the night-time, at about three A. M. o'clock on said date, certain prohibition agents entered the said premises of the said affiant, by battering down a door to the dwelling-house, which was securely fastened and locked, and breaking the sill of said doorway, and the said lock, and entered the said dwelling-house herebefore described, and immediately proceeded to search the same, without any legal or lawful search-warrant, and without any warrant whatsoever, and took from the premises certain articles; that no search-warrant was served or any left in the premises, and that [12] the said search and seizure were illegal and unlawful, as in violation of the constitutional rights of the defendant under the Fourth and Fifth Amendments to the Constitution of the United States, and in violation of the constitution of the State of Washington, Article I, Sections 6 and 9, and further, in violation of affiant's constitutional rights, in that

said articles were seized and taken from the premises without any legal or lawful search-warrant, or any search-warrant whatsoever.

FRANK ALVAU.

Subscribed and sworn to before me this 17th day of July, 1928.

[Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
Residing at Seattle. [13]

[Title of Court and Cause.]

COMMISSIONER'S HEARING.

BE IT REMEMBERED that on the 20th day of July, 1928, at the hour of 2:00 o'clock P. M., the above-entitled cause came on for hearing before the Honorable G. H. Fitch, the United States Commissioner for the above-entitled district, in the city of Tacoma, Washington, the plaintiff appearing by the Honorable John T. McCutcheon, duly appointed, qualified and acting Assistant United States Attorney, in and for the United States District Court of the Western District of Washington, Southern Division; and the defendants appearing in person and by their attorney, the Honorable Edward H. Chavelle. The Governent having announced it was ready to be heard, the witness was called and duly sworn, according to law.

WHEREUPON the following proceedings were had and testimony given in behalf of the Government, to wit: [14]

TESTIMONY OF W. H. KINNAIRD, FOR THE GOVERNMENT.

W. H. KINNAIRD, called as a witness on behalf of the Government, after having been duly sworn, was examined and testified as follows:

Direct Examination.

(By Mr. McCUTCHEON.)

Q. Mr. Kinnaird, inquiring into the case against H. Rossi and Frank Alvau you might tell what you know about this.

A. On July 12th at about 7:00 o'clock I left Tacoma and went to the premises of Frank Alvau, near Redondo, with Agents Carr and Rainey. Agent Griffith was on the place when we arrived. I could smell the distillery, and the kerosene fumes.

Mr. CHAVELLE.—You could smell what?

A. The distillery and the fumes of kerosene.

A. (Continuing.) I walked toward this odor and it was more pronounced near the cellar. I walked into the cellar and I couldn't smell it so plain because there was some goat cheese that deodorized the place to a certain extent. After searching for some time I noticed a washing-machine, and I moved that back and found an entrance to a subcellar, which was immediately off this false room. I began to push on the door and H. Rossi opened the door. There was a large distillery, and I told him to turn on the light. He did and closed the hole back up. We later went in and found a large

(Testimony of W. H. Kinnaird.)

distillery and mash and whiskey and other utensils.

Q. Had the distillery been operated? [15]

A. Yes, sir.

Q. Recently? A. Yes, sir.

Q. How much mash,—how much of a distillery was it? A. A thousand gallons.

Q. Was it in the state of fermentation?

A. Yes, sir.

Q. Where was Frank Alvau at that time?

A. I don't know.

Q. What is his connection with the distillery?

A. He lives there.

Mr. CHAVELLE.—I object to anything further,—

Q. I will ask you what else you did, what other connection he had there.

A. He ran the distillery there.

Mr. CHAVELLE.—I object to that. How does he know?

The COURT.—Go ahead and answer.

A. He told me he ran the distillery there.

Mr. McCUTCHEON.—Cross-examine.

Cross-examination.

(By Mr. CHAVELLE.)

Q. Now, you went to the premises of this man, which were in their character a private dwelling?

A. Yes, sir.

Q. And there lived a family there consisting of wife and children? A. Yes, sir. [16]

(Testimony of W. H. Kinnaird.)

Q. They had lived there for some time?

A. I couldn't tell how long they lived there.

Q. What is the description of the property? Is it a ranch, or farm?

A. It could be used as one, but it wasn't being used as such.

Q. Was the place planted in tomatoes, potatoes, beans and other vegetables?

A. There was a garden there, yes.

Q. How far from the highway was the dwelling-house?

A. About three hundred yards from the highway.

Q. Three hundred yards. Nine hundred feet?

A. I should say something like that.

Q. Was there a fence around the place?

A. Yes, I think there is.

Q. You entered this enclosure and broke into the house?

A. You know I didn't say I broke into the house.

Q. Did you? A. I did not.

Q. Then, how did you get in?

A. I walked into the door.

Q. Which door? A. Cellar door.

Q. Wasn't it locked? A. No, sir.

Q. As a matter of fact, didn't you or the agents ram or jam the door, so that it was broken?

A. Not while I was there.

Q. Did the agents do it before you was there?

[17] A. I couldn't say.

Q. They were there first? A. First, yes.

(Testimony of W. H. Kinnaird.)

Q. Didn't you notice the sill of the cellar door broken? A. No, sir.

Q. Did you say anything to anyone when you went into the house? Tell them who you were?

A. Yes, sir.

Q. Who did you talk to? A. Frank's wife.

Q. Did you tell her you had a search-warrant?

A. No, sir.

Q. Did you have a search-warrant?

A. No, sir.

Q. Did she ask for a search-warrant?

A. Not me; no, sir.

Q. Didn't you tell her you did not need a search-warrant to search for a still? A. No, sir.

Q. You didn't tell her that? A. No, sir.

Q. Did you show her your badge? A. No, sir.

Q. Did you see any of the other agents show their badge to her?

A. No, sir. I don't know whether they showed their badge or not

Q. Was the other agent there? [18]

A. One of them.

Q. Who? A. Agent Griffith.

Q. He had gained entrance to the house before you got there? A. I presume he had.

Q. What time of day did he get into the house?

A. Now, Mr. Chavelle, you know that is silly to ask me that. I don't know.

Q. Was it 3:00 o'clock in the morning?

A. I don't know.

Q. Would you say it was? A. I don't know.

(Testimony of W. H. Kinnaird.)

Q. They didn't leave you to go there?

A. I don't know.

Q. Where did they leave you to go there?

A. I don't know.

Q. Did you hear the remark made that they had searched the premises before you got there?

A. I imagine they had.

Q. Did one of them tell you there was nothing there, the only thing they smelled was the goat cheese?

A. No, sir. They told me the distillery was in operation.

Q. You searched the premises? A. I did.

Q. You spent some time searching? A. I did.

Q. How long? Four or five hours?

A. No, sir. [19]

Q. How long?

A. I found it about 8:00 o'clock in the morning. I got there about 7:30.

Q. You searched the premises an hour?

A. Yes, sir.

Q. How long had they searched before you got there? A. I don't know.

Q. They hadn't found any contraband before you got there?

A. Well, they knew the still was there.

Q. I say they hadn't found any contraband before you got there? A. No, sir.

Q. Can you describe the premises?

A. I think I can.

Q. A dwelling-house? A. Yes, sir.

(Testimony of W. H. Kinnaird.)

Q. How many bedrooms? A. Two.

Q. A kitchen A. Yes, sir.

Q. Basement? A. Yes, sir.

Q. An attic?

A. I don't know. I think there is an attic.

Q. Living-room? A. Yes, sir.

Q. You were thru all of those in your search?

A. No, not in my search. [20]

Q. But you were thru all of them?

A. Yes, sir.

Q. And you say a woman purported to be the wife of Frank Alvau? A. Yes, sir.

Q. Two children? A. Yes, sir.

Q. They lived in the house? A. Yes, sir.

Q. But Frank was not there? A. No, sir.

Q. He was not there when the search was made?

A. Yes, he was there.

Q. But he came in afterwards, you say?

A. He told me that.

Mr. CHAVELLE.—I ask to strike that.

A. He came in afterwards, yes.

Q. I thought you said he told you.

Q. Yes. But we talked about it.

Q. There was no evidence of a sale on those premises prior to this seizure?

A. I don't know about it.

Q. Well, you would know?

A. I don't know what transpired.

Q. So far as you know there was none made?

A. I couldn't say positively.

Q. So far as you know?

(Testimony of W. H. Kinnaird.)

A. I said not that I know of. [21]

A. As a result of the search you seized some articles? Yes, or no? A. Yes.

Q. Did you take a gun? A. I did not.

Q. Did any of your agents take a gun? A. Yes.

Q. That is in your possession now?

A. Yes, sir.

Q. Did you give any receipt for the articles you received—the gun and other articles?

A. No, sir,—what other articles do you mean?

Q. Any. Did you give any receipt for them?

A. No, sir.

Q. This place was not a store?

A. It was a distillery.

Q. I say it was not a store? A. No, sir.

Q. Or shop, or saloon, hotel, boarding-house?

A. It was a liquor manufacturing plant.

Q. I say, was it any of those things?

A. It might have been a saloon.

Q. Was there any evidence of intoxicating liquor being sold there? A. Yes.

Q. You answered "no" a while ago. You said there was no evidence of intoxicating liquor being sold there. Do you desire to change your statement, Mr. Kinnaird? [22]

A. Yes. He told me he did.

Mr. McCUTCHEON.—I object.

The COURT.—Go ahead.

Q. That was after you gained entrance, after your search? A. Yes, sir.

Q. Did you warn them,—

(Testimony of W. H. Kinnaird.)

A. Oh, Frank is a very nice sort of a fellow. He is all right.

Q. Yes. He is so nice he wanted to get into jail.

A. He will if some of these lawyers get a hold of him.

Q. Do you think that is humorous? When you went in there you were looking for some tangible evidence,— A. I wasn't, no.

Q. You went in there looking for a still?

A. I went in there with the other agents. They found it. They called me in.

Q. They didn't know the still was there until they found it?

A. I knew it was there before I found it.

Q. Had someone advised you that the still was there? A. Yes, sir.

Q. Told you the still was there?

A. No. They didn't tell me the still was there, but they said it was a suspicious place, and I sent the boys out to see.

Q. It was upon that information that you sent them out?

A. There were various smells out there, and I sent them out.

Q. Was that the same night they entered the place? [23]

A. It wasn't night.

Q. Well, when was it? They went out there and came back and told you the still was there but couldn't find it? A. They could smell the fumes.

Q. So they had been over this place and made

(Testimony of W. H. Kinnaird.)

a search and found nothing, then they came and got you? A. Yes.

Q. At Tacoma? A. Yes.

Q. And the place is at Redondo? A. Yes.

Q. How far is that. A. Twelve miles.

Q. And you went back with them?

A. I went back with two of them.

Q. You think three or four hours elapsed before the time that you got back there at 7:30?

A. I don't know.

Q. Don't you keep any record of your officers' movements?

A. I can't tell. I'll testify to what time they got out there.

Q. Do you know? A. I have their record.

Q. What time did they say they got out there?

A. Three o'clock in the morning.

Q. That is their record, is it? A. Yes.

Q. And does their record show they broke down the door to [24] gain entrance to the premises?

A. No.

Q. Have you got the record?

A. I don't have a report till I get their names.

Q. Have you got their names? You have the record. Can you refresh your recollection from it? A. What record are you referring to?

Mr. McCUTCHEON.—I object to that question of the record.

The COURT.—Objection is sustained.

Mr. CHAVELLE.—He refreshed his recollection from it. A. I did not.

(Testimony of W. H. Kinnaird.)

Mr. CHAVELLE.—He said it was 3 o'clock in the morning. He said it was in the record. It is a search in the night, your Honor.

The COURT.—I sustain the objection.

Mr. McCUTCHEON.—That is hearsay and I move it be stricken.

The COURT.—I grant the motion and sustain the objection.

Mr. CHAVELLE.—That is striking what he said the official records show.

Q. Is this an official record?

A. It is a daily report.

Q. It is a part of your daily record, the original entry? They make the case report?

A. They don't make any case report. We make the reports from those daily reports. [25]

Q. You said so.

A. No, the daily report is the arrests they make and what time they go to places and things like that.

Q. The facts. And do they put on this report the time they arrive at a place?

A. They should, yes.

Q. And you use those in making up your case report?

A. No, they don't. They use a book like this (indicating).

Q. And that report is a part of the record of your office? A. I keep a daily report, sure.

Mr. CHAVELLE.—I submit, your Honor, that under the official record,—

(Testimony of W. H. Kinnaird.)

The COURT.—I can't see the materiality at all.

Mr. CHAVELLE.—I understand the motion was not on the cross-examination.

Mr. McCUTCHEON.—I move it be stricken on the grounds of not proper cross-examination.

The COURT.—I want to give you all the latitude possible on this.

Mr. CHAVELLE.—Yes, I appreciate that. But this is a dwelling-house and they went out there and searched it.

The COURT.—If he had his record here to refresh his memory, but he don't seem to have it.

Mr. CHAVELLE.—Yes, your Honor. But I thought I was well within my rights. He said he refreshed his memory—they got there at 3:00 o'clock.

The COURT.—Yes. You pressed him on it. But go ahead. I will let him testify to anything he knows [26] about it.

Q. Have you the record with you?

A. No, I haven't.

Mr. McCUTCHEON.—I object to that as improper cross-examination, and not gone over in the direct examination.

The COURT.—He may answer.

A. (Continuing.) They are over in my office.

Q. Your sending the agents out here was based upon this suspicion you referred to that the place was a suspicious place.

A. I told them there was a still out there.

Q. But you had never been out there?

(Testimony of W. H. Kinnaird.)

A. Yes, sir.

Q. Before this time. A. I have.

Q. You said somebody called and reported that it was a suspicious looking place.

A. Just a minute now. They told me about the odor there. And they said Frank would run them away when anyone came around there to pick flowers. I was out at Redondo and I smelt the odor and sent the agents out there.

Q. You said a few minutes ago somebody in the office reported it to you.

A. I didn't say somebody in the office.

Q. You are right. You said somebody around there.

A. He said the still was there, underground.

Q. And then you went out? [27]

A. And he told me what happened—that Frank would run him away with a gun whenever they would come around there.

Q. He thought burglars were there?

Mr. McCUTCHEON.—I object to what he thought.

Q. I say, what was his object in running for a gun? Not to kill a prohibition agent?

A. No. Hijackers. Well, Frank is all right.

Q. Just a minute. Nobody has asked you anything. Did you make a return in this case?

A. A return of what?

Q. What you saw? A. I did not.

Q. Since you seized this liquor what have you done with it? Where do you keep it?

(Testimony of W. H. Kinnaird.)

A. I have it in my vault.

Q. I thought you said when you came in here to-day you did not have it in your vault.

Mr. McCUTCHEON.—I don't think that is material in this case, what he did with it.

The COURT.—He can answer.

A. I took it right into the vault and locked it.

Q. What did you bring it up here to-day for?

A. I didn't.

Q. Didn't you bring that up here to-day?

A. That I brought up here is for another case. I am keeping it right with me.

Q. You are afraid of it?

A. No, I am not afraid of it, but I know what you attorneys [28] do. And I am keeping it right with me.

Q. You have sole access to the vault?

A. I have unless somebody is with me. Nobody else carries a key except myself.

Q. Was it in this District?

A. It was in this District, but in a different division. It happened in the Northern Division.

Q. You can assure me can't you, or it is a fact isn't it, Mr. Kinnaird, that there was no search-warrant?

Mr. McCUTCHEON.—I object. That has been answered, a dozen times.

Mr. CHAVELLE.—He said he didn't have a search-warrant.

The COURT.—He can answer.

A. No, sir.

(Testimony of W. H. Kinnaird.)

Q. You had no search-warrant?

A. No search-warrant.

Mr. McCUTCHEON.—We admit there was no search-warrant in this case.

Mr. CHAVELLE.—Let that appear in the record —there was no search-warrant.

Q. How long a period elapsed between the time you were out there the first time,—by the way were you on the premises the first time you were out there? A. What do you mean?

Q. The dwelling-house?

A. What do you mean the first time?

Q. Prior to when these agents went there? [29]

A. I told you it was 7:30.

Q. That was the first time you saw this dwelling-house? A. No, sir.

Q. When had you seen it previous to this time when you got out there at 7:30 and the agents were there before you? A. Two weeks.

Q. Had you been on the ranch? A. No, sir.

Q. This house is pretty well located in the acreage? A. I couldn't say.

Q. Had you been inside of the yard, so to speak, or— A. No, sir.

Q. On the highway? A. Yes. sir.

Q. How many yards from the house.

A. About 300 yards.

Q. Was anyone with you then?

Mr. McCUTCHEON.—I object as improper.

The COURT.—I am going to sustain that objection. It was all before the search.

(Testimony of W. H. Kinnaird.)

Mr. CHAVELLE.—I had a reason, your Honor. I always dislike to state my reason. I don't know whether it is a good one or not.

The COURT.—I am willing to give you all the leeway possible.

Q. And they,—after that time someone told you that was a suspicious place. [30]

Mr. McCUTCHEON.—I object, That has all been gone over.

Q. When the agent was there, did you hear about the place?

Mr. McCUTCHEON.—I object.

The COURT.—Go ahead and answer.

A. I didn't hear about it after the agents went there.

Q. During the interim when you passed the house and the time you sent the agents, you heard about it?

A. Let me answer. They told me about the fellows picking flowers and about Frank chasing them away with a gun. And they concluded there must be a still there, and immediately came and asked me to investigate.

Q. And you investigated on this morning of the seizure? Is that right? A. Yes, sir.

Mr. CHAVELLE.—I think that is all.

Redirect Examination.

(By Mr. McCUTCHEON.)

Q. You personally found the still? A. I did.

Q. What kind of a gun was it? A. 38 special.

Mr. McCUTCHEON.—That is all. [31]

Mr. CHAVELLE.—Your Honor, is that all?

Mr. McCUTCHEON.—That is all.

The COURT.—Let this record show that the defendants heretofore have both been arraigned and plead "not guilty."

Mr. CHAVELLE. — The record will so show. Your Honor, in this case I am making at this time a motion to suppress the evidence. It appears clearly that the premises in question are a dwelling-house in character. They are not any of the places described by law—a store, saloon, shop, hotel. But there is a man living there. A man, a wife and two children living in a house with two bedrooms, a living-room, a kitchen. There was some question about an attic. There was no evidence of the sale of intoxicating liquor. In the night-time, or if the Court desires—I think the Court can take legal cognizance of that—it was in the night-time, these premises were entered without a warrant, searched without a warrant. Of course the Court knows it doesn't matter if there was a still here in operation, the place is still in the character a dwelling-house, nothing but a dwelling-house. Therefore, in order to enter the premises there would have had to have been a valid, legal search-warrant, and in order to secure that there would have had to be a showing, and a showing would require necessary facts to procure a search-warrant, would require that facts were stated to show probable cause and offenses committed, to show by conclusion of the witness there was a still there. [32] The statement of the

(Testimony of W. H. Kinnaird.)

fact that he had a suspicion there was a still there would be no evidence of the character and type that could go to a jury; and that is the kind of evidence that would be necessary to set forth in the affidavit for service in order to procure lawful and legal search-warrant. As the law classified it, it must be that class of evidence before it could go to a jury. He says that someone told him that the people out there were acting very queer. To put the most liberal construction on it, they wouldn't let people enter to pick flowers, that there was something strange about the house. He asked them if they smelt anything and they told him "yes" and he arrived at a conclusion, or belief, there was a still there. So he sent a man out, and then went out and found a still. When they entered the place, they were looking,—they entered under a suspicion. They were looking for evidence which they could take to the jury. The same character of evidence. It was in the night-time. There had been no description of any article or things to be seized. They did not know when they entered there whether they were going to find anything or not. The witness also said when he got in there that the cheese so deodorized the place that he couldn't smell it. There was a long search. There was no offense committed in their presence. They went in there to look for an offense, to find evidence. Our Circuit Court has time and again said there can be no search of a dwelling. [33] In 299 Federal, they now say no dwelling-house can be searched unless

(Testimony of W. H. Kinnaird.)

evidence of a sale is found. In the Temperani case, there was a garage underneath the house. The officers said when they went by they smelt the fumes of a still in operation. They entered the garage, which was a part of the house. It was a cottage and the garage was joined, built into the house, although it was separated from the house. Judge Rudkin, speaking for the Court says that the agents entered and discovered stills in operation. But he said they entered to get the evidence, not because a crime was committed in their presence. There was no crime. Judge Rudkin said in that case that the constitutional rights of people will not be invaded by a lawful search and seizure, even under the circumstances where there was no denial of the evidence. The house was upon the street and the men passed upon the sidewalk and smelt the fumes.

Now, this house was back where there was no probability of their having smelt the odor. They only put that into the case to make the case difficult. In other words to add an element, but they are defeated. These men say themselves they were suspicious. And the officer sent the agents out, not because a crime was committed in their presence, but because they had suspicions, and they searched the house without any lawful warrant whatever.

Under the circumstances, your Honor, I don't know of a clearer case where a motion for suppression of the evidence should be granted. [34]

The COURT.—I take it for granted that you meant the owner of the premises.

Mr. CHAVELLE.—Your Honor, in order to make a motion to suppress the evidence, I would have to admit the facts of course, that Frank Alvau, one of the defendants,—the record may show it is for Frank Alvau only, that occupies these premises and is owner of the premises, that he occupies these premises with his family and is owner of the premises, or is buying it under a contract.

The COURT.—And is owner of the still.

Mr. CHAVELLE.—Not at all. I deny that.

The COURT.—I don't know what right we would have to suppress the evidence. He was there.

Mr. CHAVELLE.—He is the owner of the premises. In making the motion, he don't have to admit he is the owner of the still. And he don't; he denies it.

Mr. McCUTCHEON.—Your Honor, if he denies the ownership of the still we will charge him under the revenue bond. If he denies operation of that still, ownership of the apparatus, if he denies all connection with the ownership I don't see what there is to suppress on.

Mr. CHAVELLE.—Because the premises were entered unlawfully and articles were seized.

Mr. McCUTCHEON.—They didn't seize anything.

Mr. CHAVELLE. — They seized the gun, and other articles were seized. And there was no receipt given for the articles seized. [35]

The COURT.—I think under the Temperani case it wasn't necessary to give a receipt. It is not nec-

essary to make a return on the search-warrant. It is not necessary under the jurisdiction of this District.

Mr. CHAVELLE.—This is not in this district of course. The Court must consider that, I suppose.

Mr. McCUTCHEON.—That case under 299, is that a Volstead or Revenue?

Mr. CHAVELLE.—Under the National Prohibition Act you can't search a dwelling.

Mr. McCUTCHEON.—We haven't charged him under the Prohibition Act, but under the Revenue Act.

The COURT.—37 PC—Conspiracy.

Mr. McCUTCHEON.—I don't think it is charged.

The COURT.—Yes, it is.

Mr. McCUTCHEON.—This says in part,—(reading).

Mr. CHAVELLE.—Our Circuit has not laid down any such law.

The COURT.—There is a distinction between a charge under the Internal Revenue Act and the Volstead or National Prohibition Act. Judge Cushman has always held,—

Mr. CHAVELLE.—Our Circuit Court has not made any.

The COURT.—You will find,—

Mr. CHAVELLE.—You will find our Circuit Court is upheld.

The COURT.—You will find it pretty well di-

vided. There is quite a distinction in the law. [36]

Mr. CHAVELLE.—Here is the ruling we have had over at Seattle. Judge Neterer has sustained a motion of this act. He went so far here the other day in a narcotic case,—

The COURT.—That is different.

Mr. CHAVELLE.—They were charged under the right to collect revenue,—

The COURT.—Oh, I see.

Mr. CHAVELLE.—The agent testified they had a search-warrant. He testified he stood outside the door, put his nose down, and smelt the fumes of smoking opium. Thereupon he went and secured a search-warrant. So Judge Neterer sustained the petition to suppress the evidence on the grounds that you could not enter a dwelling-house upon that kind of an affidavit.

Mr. McCUTCHEON.—I would like to read these two paragraphs.

Mr. CHAVELLE.—Even tho they had a search-warrant. They entered here upon a suspicion. They were told that things were very peculiar around there, and they sent the agents right over, and they went in after several hours of search they seized some articles.

The COURT.—That was right here in this district. The Temperani case,—

Mr. CHAVELLE.—Yes it is a distillery. I can give it to you.

The COURT.—I think you will find it under the National Prohibition Act. [37]

Mr. CHAVELLE.—Oh, yes.

The COURT.—One of the main issues in that case also was a motion to suppress the evidence on the grounds that no receipt was given for the goods accepted.

Mr. CHAVELLE.—They don't say that in their decision your Honor.

The COURT.—There was some reference made to it. What was that other, Mr. McCutcheon?

Mr. McCUTCHEON.—I was speaking of the Volstead Act. (Reading.)

Mr. CHAVELLE.—By the weight of authority of law, the fact that liquor is being distilled is not sufficient evidence,—it must appear that the dwelling-house was used in part for the unlawful sale, used in part for some other business purpose. (Reading from McFadden on Prohibition, page 219.)

The COURT.—I think you will find there is a distinction lies there between the Internal Revenue Act and the Volstead, or National Prohibition Act. And also in some of those decisions, I am not entirely familiar with all the facts.

Mr. CHAVELLE. — (Reading.) A dwelling-house cannot be entered.

Mr. McCUTCHEON.—I understand a person living in a still, you couldn't claim it was a dwelling-house.

The COURT.—I think it has been the ruling of

Judge Cushman that when a distillery is kept at a dwelling [38] that changes it from the character of a dwelling to the character of a distillery. I always thought the Court was right, because otherwise I don't see how in the world you could ever distinguish a dwelling from a distillery. I don't see now how they can enforce those three sections.

Mr. CHAVELLE.—The Judge says it is up to Congress, and I think it is.

The COURT.—I think if they have proper cause to believe there is a violation of the law in a private dwelling, they can go in without a search-warrant.

Mr. CHAVELLE.—Do you think it issuable under the Internal Revenue Law? There is some argument there.

The COURT.—I know there is. At the same time the issuance of a search-warrant was almost unknown a hundred years ago. You couldn't get a search-warrant, but not *it* is an entirely different proposition.

Mr. CHAVELLE.—I don't know of a decision where they have been permitted to enter a private dwelling-house without a search-warrant. I have ben trying to think of some case. Of course if an offense was committed in their presence, if a door was opened,—

The COURT.—If it is a case where you can look thru a door and see a still,—

Mr. CHAVELLE.—That was the Mobile case I referred to awhile ago.

The COURT.—Judge Cushman says, why if they can smell it,—

Mr. CHAVELLE.—Our Court has twice sustained the [39] Temperani case. There was no sign of a sale.

The COURT.—I think you will find that under National Prohibition Act.

Mr. CHAVELLE.—I don't know of any decision to the contrary. He says the Courts have so held,—

The COURT.—I don't think under the circumstances,—have you any testimony at all?

Mr. CHAVELLE.—How about the bond.

The COURT.—I will leave it the same amount, and issue an order binding over both defendants. Will you have these defendants sign up these bonds and have them acknowledged? I wish the Supreme Court of the United States could come out and tell us just how far we can go in these cases.

Mr. CHAVELLE.—They won't do it. They just slip around it somehow.

(Thereupon hearing closed at 3:00 P. M., July 20, 1928.)

[Endorsed]: Filed Sep. 28, 1928. [40]

[Title of Court and Cause.]

TRIAL.

Now on this 3d day of December, 1928, Tom DeWolfe, Assistant United States Attorney, appearing for the plaintiff, and E. H. Chavelle, appear-

ing as counsel for the defendants, this cause is called for trial at 2 P. M., the Government announcing that it is ready. Counsel for defendants states that for the purpose of being timely therein he desires to present a motion to suppress the evidence. The Court states that it will be disposed of upon the evidence adduced at the trial, and an exception is noted by the defendants' counsel. Awaiting return of the jurors excused to that hour this morning further proceedings are continued to 3 P. M., at which time both sides being ready, a jury is impanelled and sworn as follows: Frank J. Larebe, E. F. Myron, Walter White, J. O. Anderson, Henry G. Runkel, Fred Woodson, A. Mock, E. M. Taylor, Carl T. Ehlers, Harry C. Wilson, William Erb, H. J. Gould. Counsel for both sides make opening statements to the jury. Government witnesses are sworn and examined as follows: C. H. Griffith, Howard Carr, W. H. Kinnaird, Government exhibits numbered 1 to 9, inclusive, are admitted in evidence. Government rests. Counsel for defendants renews motion to suppress the evidence. Whereupon the Court rules the evidence competent and legally obtained and the said motion is denied. An exception is noted. Defendants move to strike the evidence of each and all of the Government's witnesses. The motion is denied and an exception is noted. Counsel for defendants moves for a directed verdict and the motion is denied. An exception is noted. Defendants' witnesses are sworn and examined as follows: J. Charles Stanley, Fred C. Campbell, Lester D. Un-

ger, Urban C. Huff, David Levine, Humbert Rossi, Anita Alvau. [41] Government exhibits numbered 10 and 11 are admitted in evidence. Exhibits numbered 12, 13, 14 are identified. Exhibits numbered 15 to 22, inclusive, are admitted in evidence. Defendants rest. Rebuttal witnesses are sworn and examined as follows: W. M. Kinnard, Howard Carr. J. Charles Stanley, recalled, for defendants by leave of Court. Both sides rest. Counsel for defendants renews motion for a directed verdict. The motion is denied and an exception is noted. Counsel for defendants renews motion to suppress evidence, which motion is denied and an exception noted. Counsel for defendants renews motion to strike all the evidence and said motion is denied. An exception is noted. Defendants offer in evidence the affidavits supporting the motion to suppress the evidence. The Government offering no objection, the motion is granted. The Government objecting thereto, a motion to admit in evidence the record of hearing before the United States Commissioner is denied and an exception is noted. The cause is argued to the jury. Whereupon the jury is admonished by the Court and the case is continued to 10 A. M. to-morrow.

Recorded in Journal No. 16, at page 481. [42]

[Title of Court and Cause.]

TRIAL (RESUMED).

Now on this 4th day of December, 1928, all jurors

and parties being present, the trial of this cause is resumed pursuant to adjournment. The jury is instructed and after exceptions taken thereto by the defendants, the jury retires shortly after 10 A. M. to deliberate of a verdict. Later, upon request therefor directed to the Court in writing by the foreman, the Court directs the sending of defendants exhibits identified as 13, 14 and 15, to wit, insurance policies, to the jury. At 2 P. M. the jury returns into court with a verdict, which reads as follows, to wit:

> "We, the jury in the above-entitled cause, find the defendant, Frank Alvau, is guilty as charged in Count I of the Indictment herein; and further find the defendant, Humbert Rossi, is guilty as charged in Count I of the Indictment herein; and further find the defendant, Frank Alvau, is guilty as charged in Count II of the Indictment herein, and further find the defendant, Humbert Rossi, is guilty as charged in Count II of the Indictment herein; and further find the defendant, Frank Alvau, is guilty as charged in Count III of the Indictment herein; and further find the defendant, Humbert Rossi, is guilty as charged in Count III of the Indictment herein.
>
> H. J. GOULD,
> Foreman."

The verdict is received read, acknowledged by the jury, and ordered filed. The jury is excused from the case. Sentences are passed at this time. On motion of defendants for stay of execution for

the purpose of filing a motion for a new trial, the defendants are granted twenty-four hours in which to file the motion for new trial and stay of execution is granted for that time.

Recorded in Journal No. 16, at page 485. [43]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find the defendant Frank Alvau is guilty as charged in Count I of the indictment herein; and further find the defendant Humbert Rossi is guilty as charged in Count I of the indictment herein; and further find the defendant Frank Alvau is guilty as charged in Count II of the indictment herein; and further find the defendant Humbert Rossi is guilty as charged in Count II of the indictment herein; and further find the defendant Frank Alvau is guilty as charged in Count III of the indictment herein; and further find the defendant Humbert Rossi is guilty as charged in Count III of the indictment herein.

H. J. GOULD,
Foreman.

[Endorsed]: Filed Dec. 4, 1928. [44]

United States District Court, Washington.

12620.
U. S.
vs.
BEACH.

12622.
U. S.
vs.
ALV*A* and ROSSI.

OPINION.

Defendants were tried for violation of sections 3266, 3281, 3282, R. S., crimes of the grade of felonies. These are internal revenue statutes of many years standing, to control and tax manufacture of distilled spirits, and severally provide penalties for (1) using a still in a dwelling-house, (2) carrying on the business of a distiller without having given bond, and (3) fermenting mash in any premises other than an authorized distillery. Defendants Beach and Alv*a*, but not Rossi, timely moved to suppress the evidence as illegally secured, and in economy of time and procedure in a court congested as are all federal courts, with more cases than can be speedily tried, the greater part of which are petty matters of police filched from the states (See Yellowstone Bank Case, 277 Fed. 71), and which ought to be tried in federal police courts, the motions were heard in trial of the cases, defendants to have the benefit if of merit.

The Court found that the evidence was legally secured and competent, defendants by juries were found guilty, sentenced, and move for new trials. In Beach's case the evidence is that he fermented mash, set up and operated a large still as charged, in a small house which he for the time at least was occupying as a dwelling.

In his absence prohibition agents arrived with a search-warrant, entered the premises, searched and found the contraband articles, arrested him returning, and this indictment followed. [45]

The basis for probable cause and the warrant was an agent's affidavit that in the premises three named persons and others unknown were in possession of a still, distilling apparatus and materials designed to make, and therein are selling, intoxicating liquor; that therefrom emanated the odor of fermenting mash; that he had seen materials for manufacture taken in containers usual for intoxicating liquor carried out, and heard one of said persons state that intoxicating liquor was for sale therein; and that said premises were used for manufacture of intoxicating liquor as well as for dwelling.

In Alva and Rossi's Case, the evidence is that the prohibition agents being informed the former's actions upon his ranch were "suspicious," proceeded to investigate. Arriving at the premises the agents were at once sensible of the usual strong, penetrating and unmistakable odors of a distillery in operation, viz., fermenting mash and a still operating and by kerosene burners.

These they traced to the dwelling-house of Alvo. Their hails unanswered they forced the basement door, and proceeded to search. For a time baffled, at length they found a hidden door from the basement into another basement otherwise inaccessible and concealed, wherein was a 200-gallon still in operation, 1,000 gallons of fermenting mash, and the other usual appliances to a complete large scale distillery. Alvo and his family were occupants of the house, and Rossi was found in the still-room and evidently operating the plant.

Much of the comment of the writer in Cala's Case, 17 Fed. (2) 829, reversed, 22 Fed. (2) 742, Herter's Case, 24 Fed. (2) 111, reversed, 27 Fed. (2) 521, applies to the instant cases and is incorporated by reference.

The distinction between the cases is clear and vital, viz., those were prosecutions for violations of the Volstead Act, misdemeanors; these, for violations of the Internal Revenue laws, felonies. These latter amongst other things provide that every [46] person who makes mash or "produces distilled spirits . . . . shall be regarded as a distiller" (§ 241, Title 26, U. S. C.), that taxes shall be levied and collected (§ 245, 2d.), that no still shall be used in a dwelling-house (§ 291 2d.), that it is "lawful for revenue officers at all times to enter into any distillery or building or place used for the business of distilling. . . . to examine, gauge, measure, and take account of every still . . . . and of the mash and spirits which may be in any such distillery or premises," and refused

admission, it is lawful for the officer to break and enter (§ 299, 2d).

These statutes are existing law, and the prohibition agents being vested with all the power by them created (§ 45, Title 27 U. S. C.), and the premises being used for the "business of distillation," the entries by the officers made were lawful.

Moreover, in Beach's case the search-warrant was based upon an affidavit disclosing probable cause. And in Alvo's case, the agents had knowledge of a crime being committed, which on settled principles authorized entry to interrupt and to arrest the offenders. The motions for new trials are denied.

Dec. 10, 1928.

BOURQUIN, J.

[Endorsed]: Filed Dec. 10, 1928. [47]

[Title of Court and Cause.]

ANSWERING AFFIDAVIT OF FRED C. CAMPBELL.

United States of America,
Western District of Washington,
Northern Division,—ss.

Fred C. Campbell, being first duly sworn, on his oath deposes and says that he is a citizen of the United States, and a resident of the city of Seattle, King County, Washington, practicing law in said city and State; that his law offices are located in the Repubic Building of said City; that on the 30th

day of October, 1928, this affiant went to the home of Frank Alvau, located at Redondo Beach, King County, Washington, for the purpose of making a thorough examination of said premises, and to ascertain where the alleged still purported to have been found by the Federal Agents in this cause was located; that he thoroughly examined said residence and discovered the following facts:

That said residence is an ordinary dwelling-house, located on an elevation considerably higher than the county road which runs past the same, at a distance of about one thousand feet or more from said dwelling; that there is large garden in which vegetables and crops for the support of the family are raised; also a chicken-yard in which chickens and a cow are kept for the use of the family, and a well and substantially built residence with a heavy cement foundation, completely under the said house; that affiant was shown the place where the alleged still was found by federal agents, and that portions of said alleged still were in said place, to wit, what was at one time supposed to be the [48] brick foundation for the said still. That this affiant made a careful and minute examination of the foundation of said premises and denies that there is any room constructed or could have been constructed without coming under the observation of this affiant which was directly under the residence of said house and in said basement, and that the allegations in the affidavit of Howard E. Carr on file in this cause "that the still-room was not even under the rest of the house, but was excavated on the outside of the

foundation limits" is absolutely false and untrue, but that said room where said alleged still was alleged to have been in operation is directly under the kitchen of said residence and clearly within the inside limits of the original foundation of said house; that the basement hertofore referred to is a part of the dwelling-house of the said Frank Alvau and is used for the purpose of storing food, laundry and for such other and ordinary purposes as basements are used for in such dwelling-houses; that this affiant examined the lock on the inside of said basement door and noted that the woodwork on said door had been broken off by some heavy force from the outside; that there is an entrance from said basement to the kitchen of said residence by means of a stairway at the top of which is the ordinary house door. That this affiant specifically denies that there is any foundation that is not under the rest of the house, and alleges the fact to be that no such condition exists. This affiant further states that he has no interest in this case either as an attorney or otherwise, but makes this affidavit for the sole purpose of getting the true facts before this honorable Court.

Further affiant saith not.

FRED C. CAMPBELL.

Subscribed and sworn to before me this 2d of November, 1928.

M. H. CUSHING,
Notary Public in and for the State of Washington,
Residing at Seattle. [49]

Received a copy of the within affidavit this 2d day of Nov., 1928.

ANTHONY SAVAGE,
Attorney for Ptff.

[Endorsed]: Filed Nov. 2, 1928. [50]

[Title of Court and Cause.]

ANSWERING AFFIDAVIT OF GINO ALVAU.

United States of America,
Western District of Washington,
Northern Division,—ss.

Gino Alvau, being first duly sworn, upon his oath deposes and says that *he eleven* years of age and in the sixth grade at the Steel Lake School, King County, Washington. That on or about the 12th day of July, 1928, this affiant states that he was sleeping on the second floor of the said dwelling-house, and occupied a bedroom alone, and did at all times hereinafter mentioned. That he was awakened by the sound of footsteps upon the stairs and immediately thereafter a man came into the room. That the condition of the night was such that he could not distinguish the man's face in the darkness; that he overheard the following conversation, and that his father, Frank Alvau, one of the defendants herein, said: "Where are your papers?" That thereupon the man said in answer to his father, "I don't need any papers." That his father said to the man, "Where is your star?" That the man,

who later was identified as a prohibition agent, searched his room, and his father's room. That later on, about fifteen minutes after he had searched the house, he went out to the porch upstairs, and called, "Hey, Charlie," and someone answered "All right," and then two men came upstairs and again searched the dwelling-house, and they went [51] from the bedroom of the said defendant, Frank Alvau, to the unfinished portion of said dwelling known as an attic of said dwelling-house. That after making the said search of said bedrooms and attic they went downstairs again.

Further affiant saith not.

GINO ALVAU.

Subscribed and sworn to before me this 29th day of October, 1928.

M. H. CUSHING,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within affidavit this 2 day of Nov., 1928.

ANTHONY SAVAGE,
Attorney for Ptff.

[Endorsed]: Filed Nov. 2, 1928. [52]

[Title of Court and Cause.]

ANSWERING AFFIDAVIT OF ANNETTA ALVAU.

United States of America,
Western District of Washington,
Northern Division,—ss.

Annetta Alvau, being first duly sworn, upon oath deposes and says, that she is the daughter of the defendant, Frank Alvau, and that at all of the times hereinafter mentioned lived at the premises constituting and comprising the family dwelling-house, the residence of the said defendant. That she is of the age of nine years, and is in the fourth grade in the Steele Lake School; that on or about the 12th day of July, 1928, this affiant was sleeping with her mother in the said dwelling-house and residence referred to, when she was awakened by the noise and motions incident to the prowling about the house by the prohibition agents; that she looked out of the window of said premises from her bedroom and saw in the darkness the figure of what appeared to her to be a woman; that thereafter she heard the crashing and breaking into of said dwelling-house and thereupon some strange man entered her bedroom (who subsequently was identified as connected with the Prohibition Department of the Federal Government). That between the period of time that she heard the crashing and breaking into of said premises and the appearance of said man, was about the time that would have

been sufficient to have broken into the house and entered said bedroom. That the bedroom in question hereinafter referred to is on the first floor [53] of said dwelling-house and that the aforesaid agent stated in the presence of said affiant as follows, "Pardon me, I have made a mistake." The condition of the night was very dark.

Further affiant saith not.

ANTONIETTA ALVAU.

Subscribed and sworn to before me this 29th day of October, 1928.

[Seal] M. H. CUSHING,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within affidavit this 2 day of Nov. 1928.

ANTHONY SAVAGE,
Attorney for Ptff.

[Endorsed]: Filed Nov. 2, 1928. [54]

[Title of Court and Cause.]

ANSWERING AFFIDAVIT OF MARY ALVAU.

United States of America,
Western District of Washington,
Northern Division,—ss.

Mary Alvau, being first duly sworn, upon her oath deposes and says that she is the wife of Frank Alvau and mother of Annetta and Gino Alvau and lives with her husband and children in a frame

dwelling-house at Redondo, King County, Washington. That the said dwelling-house consists of four rooms, upon the main or first floor being the kitchen, dining-room, living-room and a downstairs bedroom. That the said house being plastered and completely furnished as a dwelling-house and occupied by the said defendant Frank Alvau and his family, consisting of a boy and girl, ages eleven and nine respectively. Also a full cement basement, the entrance of which leads by a stairway into the kitchen. That on the second floor there are two bedrooms furnished, plastered and occupied by the son of this affiant and her husband, together with an unfinished portion of said dwelling-house, used as an attic. That there is a porch on the front of the said house adjoining the downstairs porch thereof. That the said dwelling-house is situated on a large tract of land about one thousand feet from the entrance of the gate to said premises, sitting on a point that is a considerable elevation above the level of the road to said entrance. That surrounding the house are flower gardens, a well, and a water system and beyond the said flower gardens are large vegetable gardens which are cultivated and crop bearing in season; that said vegetables [55] raised from the land are used for the sustenance of the family and at the rear of said house are chicken-yards, produce and chicken eggs being used for the table of the family. That in the pasture adjoining the said house is a cow, kept by the said family for the milk that is used in making cheese for the market and for the use of the family. That they have occupied

the said dwelling for three years immediately prior to the 12th day of July, 1928. Said dwelling-house having been built as such by affiant's husband and so occupied ever since its completion. That on the day in question, namely, the 12th day of July, 1928, affiant was awakened in the night-time, about the hour of three A. M., by the barking of a dog. That her little daughter, who was awake at the time, and next to the window, told affiant that a woman was outside of the house. That her husband said to her, "Don't be scared," believing as he told her that there was someone trying to break into the house, thinking that it was a prowler intent on stealing. That her husband did not leave the premises or go outside the said dwelling-house, but was at all times herein mentioned in said house. That thereupon the affiant heard the breaking in of the basement door, and the entry of a man into her room, who proceeded to search the room. After searching around, the man (who was later identified as a prohibition agent) said, "Pardon me, I have made a mistake." Then he ran upstairs where affiant's husband was at all times herein mentioned and where her son slept. That her husband spoke and said, "Who is it?" That thereafter affiant did not hear any further part of that conversation. That thereupon this affiant got up from her bed. The night was still dark, and affiant turned on the electric lights so that she could see, and made a fire in the kitchen range. That thereafter this affiant went to the chicken-yard in the rear of the said premises to feed the chickens and three or four

men went to the chicken-yard [56] of said premises apparently looking for something that they could not find. One man remained in the house and searched about the house, the house having been previously searched by them, and the search continued. About fifteen minutes after, while this affiant proceeded with her housework, one of the men came into the house, still searching about, making a complete search about the premises. It was still dark and the lights were burning to give affiant light to see about her work. That then again, two of the men went upstairs and affiant followed them to see what they were going to do, and they searched about, going even into the clothing of this affiant which they threw around, and took from the closet a revolver. That in running around the house one of the men, by reason of the condition of the weather (as it was raining), asked if he could go into the basement where there was a stove to dry his clothes, and this affiant told him he didn't need to go into the basement, but could come into the kitchen where she had a good fire burning. Affiant helped him to dry his clothes and gave him a hot cup of coffee to help warm him up. That the search continued by the four men until about seven o'clock and then all of the men left and went away except one. That the man who returned, dried his clothing for awhile and proceeded to search the house again, then back to the stove, and would look around in the house searching for something. That between seven and eight o'clock, affiant's husband was permitted to leave the premises and was away until about eleven

o'clock, being away about four hours. That one of the agents being a real stout man, said to the boy of the affiant, "Did you see a still," and the boy inquired, "What is a still, do you mean a robbery?" Then affiant took her little boy into the house. That affiant has read the affidavit of Howard Carr. That said agents were on the premises as hereinbefore related continuously from about three A. M. of said day [57] until nine o'clock, when they claimed to have discovered a still after the persistent search of said dwelling-house, namely, of about six hours. That after all of the agents who were then there had eaten their lunch, they left the same after two o'clock, some of them being there from three A. M. of said morning. That the statement of Howard Carr that the still was not even under the rest of the house, but was excavated in the ground outside of the foundation limits of the house is false and untrue. Affiant states the facts to be that the said part of the house just referred to is a part of the original foundation of said dwelling-house, and directly under the kitchen of said house, and that the walls are a continuous part of the said original foundation upon which said house was built and now rests and that there is no excavation in the grounds outside of the foundation limits of the house, but that all of the said premises are strictly within the limits of the foundation of said house. That affiant further states that the entrance of said basement is the ordinary entrance that one would expect to find in a dwelling of this character, being a door leading from the basement to the outside and there

is nothing unusual about the entrance of said premises but that said door is an ordinary basement door, affording access to the premises from the outside or to the outside from the said inside of the house, and leading from the basement to the lower floor of said premises. That further the said statement of the said Carr that no entrance into the living quarters of Alvau was made until after said still was seized and defendant arrested for a crime committed in the agent's presence is false and untrue and that the facts are as heretofore alleged that agents searched said house at least six hours before finding the alleged still. That affiant further states that she is the wife of the said defendant, [58] Frank Alvau, and the person referred to in the affidavit of said Carr, and that she did not state in the presence of Frank Alvau and of Frank Carr, or anyone else, that there was a still on the place and that the agents would be unable to find it. That she had no conversation with said officers except as hereinbefore related, which is the substance or whole of her conversation with him during all of the time of their presence on the premises. That the said Frank Alvau was permitted by said officers to leave said premises early in the morning and to remain away from the same having come to Seattle (having afterwards returned) for a period of more than four hours, and that no conversation, as stated by the said Carr in the said affidavit, ever took place, and affiant denies the whole of said allegation pertaining to any of such conversation. Affiant further specifically denies that said de-

fendant Frank Alvau attempted to drive the agents from the vicinity with a gun, or that he ever came out of the premises, or left the dwelling-house on the morning in question except as hereinbefore stated, and that he was in the premises at all times as the agents searched until they gave him permission to leave for Seattle.

Further affiant saith not.

MARY ALVAU.

Subscribed and sworn to before me this 29th day of October, 1928.

M. H. CUSHING,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within affidavit this 2 day of Nov., 1928.

ANTHONY SAVAGE,
Attorney for Ptff.

[Endorsed]: Filed Nov. 2, 1928. [59]

[Title of Court and Cause.]

ANSWERING AFFIDAVIT OF FRANK ALVAU.

United States of America,
Western District of Washington,
Northern Division,—ss.

Frank Alvau, being first duly sworn, upon his oath deposes and says: That he is one of the de-

fendants in the above action, that the premises described in this case were used by said defendant and his family as a dwelling-house and the land on said premises was used to raise vegetables and crops for the support of the said family, and also the chicken-yard and meadow where are kept chickens and a cow which are used for the same purpose, in the description of the premises as set forth in the affidavit of Mary Alvau, wife of defendant, and which affidavit is heretofore accepted and referred and made a part of this affidavit as far as the description of said premises and ground. That Frank Alvau has read the affidavit of the said Howard Carr, submitted in evidence in a motion to suppress in this cause, and denies that there was any pool of refuse mash found on the premises as hereinbefore described of this affiant other than the alleged mash found by said agent in the basement of said premises, after the breaking in by said agent of affiant's residence; that the statement of the agent that said defendant, Frank Alvau, came out of said premises and attempted to drive out the said agents at the point of a gun is false and untrue; that affiant at no time left the premies until he was permitted by the agents to go to Seattle, from whence he returned, having consumed about four hours on said trip; that said [60] affiant denies the statement of said Carr that his wife stated in his presence and in the presence of said Carr that there was a still on said premises, and that agents would be unable to find it, that he did not repudiate such a statement, as there never was

a statement of this kind or character that he could repudiate, and that there are no concrete walls other than the foundation for said house and that the said dwelling-house completely occupies and rests upon the walls of said foundation and there is no part of said foundation that said house does not rest upon. Affiant specifically denies that there is any wall or foundation that is not even under the rest of the house, but was excavated under the foundation limits of the house, as being false and untrue, and that no such condition exists. Affiant further states that the basement door referred to in the affidavit of said Carr is an ordinary basement door as can be expected to be found in any dwelling-house, and the forced ingress and egress into the same constituted a basement and from the basement by the usual stairway to the first floor.

That affiant further states that on or about the 12th day of July, 1928, he heard the dog barking and thereafter some noises about his house, and thereupon discovered what he believed to be a prowler peeping into the bedroom windows of said dwelling-house. That he attempted to allay the fear of his wife and minor daughter; that he thereafter heard the breaking of the basement door by the entry into the house of said prowlers and that thereupon a man entered his bedroom, and the conversation that took place was as follows: Affiant said, "Who you are?" the answer was, "Federals." Affiant said, "Where your papers?" and the answer was, "Don't need any papers"; then affiant asked, "Where is your star?" Thereupon the man

showed his star, and proceeded to search the bedroom of affiant, and it was about three A. M. o'clock and it was very dark. He searched the bedroom of affiant and then searched the bedroom of affiant's son, which was separated from affiant's bedroom, and [61] then the attic, which was the unfinished part of the upstairs; then he went out upon the upstairs porch; that thereafter, after searching all of the upstairs of the said dwelling-house, and all of the rooms therein, the man went to the basement. There were at least three in the basement of said dwelling-house. That one of the agents said there was no still here, and "What we smell is cheese." The basement being full of cheese being made from the milk of the cow. That they then came upstairs again and searched all around and one of the agents said, "We have not started yet to look," and they proceeded to look over all the rooms and parts of the said dwelling-house. They then went down to a point where affiant has his cesspool about seventy feet from the house and asked affiant for a crowbar, and affiant said he had no crowbar, and they then asked for a shovel and they went down and dug at a point where the cesspool was located. They seemed to be very much disgusted at apparently not finding what they were looking for. Then one of the agents said, "You hold this dog," meaning the dog belonging to affiant and family, "Or if you don't I am going to shoot him," and affiant said there was no need of killing the dog, and then he went and looked in the house where the chickens of affiant were kept; and

then he searched all the premises with the other agents. That the agents would alternate between the search of the premises outside, and then would come inside and search inside of the house and then would go outside of the house and search about and return again into the said house and kept this up on said premises until about seven o'clock, a period of approximately four hours, when two or three of the men left the place and went away, leaving one man behind on the premises. That the said one agent was drying his clothes by the fire and the wife of this affiant gave him a hot cup of coffee. Affiant explained to this agent that he had an appointment in Seattle that he had to keep and the agent told him to go to Seattle and keep his [62] engagement and attend to his business, which kept him three or four hours, and returned to the said premises. That two of the men stayed for lunch and had their dinner with the affiant and his family, and then another of the agents said he was hungry and wanted to know if he could have something to eat, and then affiant fed him, being Agent Kinnair.

Further affiant saith not.

FRANK ALVAU.

Subscribed and sworn to before me this 29th day of October, 1927.

[Seal] M. H. CUSHING,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within affidavit this 2 day of Nov., 1928.

ANTHONY SAVAGE,
Attorney for Ptff.

[Endorsed]: Filed Nov. 2, 1928. [63]

[Title of Court and Cause.]

ANSWERING AFFIDAVIT OF HUMBERT ROSSI.

United States of America,
Western District of Washington,
Northern Division,—ss.

Humbert Rossi, one of the defendants named herein, being first duly sworn, upon his oath deposes and says: That on or about the 12th day of July, 1928, he was present at the premises of Frank Alvau, at his dwelling-house at Redondo, King County, Washington. That the said dwelling-house is the same dwelling-house described in the affidavit of Mary Alvau, which is referred to and made a part herein; that said affiant has read the affidavit of Howard Carr, in resistance of a motion to suppress in this cause, and that the said affidavit of said Carr is false and untrue and that the said Carr says there is a foundation and excavation outside of the premises of said dwelling-house. That there is no such foundation,—in fact that the only foundation is the foundation on which the house solely rests, and that there are no outer

walls or excavation adjoining the said premises. That the said, Humbert Rossi, affiant herein heard and saw someone prowling around said house and thereafter a crashing and breaking of the basement door of said dwelling and the entry into of said house by some prowlers, at about the hour of three A. M. o'clock on said 12th day of July, 1928. That the night was dark and cloudy and rainy. That the said premises were used by the said Frank Alvau and family, consisting of a son and daughter and wife, together with the ground adjoining thereto, solely as a dwelling-house. [64] That thereafter affiant examined said door of said house, and that said door showed that the sill of door had been broken by a forceful entry thereof. That there is nothing about the entry of said basement that is different from the entrance of said door to any other dwelling-house of a similar kind and character. That the said agents were in said premises for a period of about six hours searching the same.

Further affiant saith not.

HUMBERT ROSSI.

Subscribed and sworn to before me this 29th day of October, 1928.

[Seal] M. H. CUSHING,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within affidavit this 2 day of Nov., 1928.

ANTHONY SAVAGE,
Attorney for Ptff.

[Endorsed]: Filed Nov. 2, 1928. [65]

[Title of Court and Cause.]

AFFIDAVIT OF J. CHARLES STANLEY.

United States of America,
Western District of Washington,
Northern Division,—ss.

J. Charles Stanley, being first duly sworn, on oath deposes and says: That I am an architect, duly licensed and practicing, and a graduate of the School of Architecture of the University of Pennsylvania, in 1906; that I have maintained an office in the city of Seattle for many years, and now maintain an office in the Republic Building on Pike Street, in Seattle, King County, Washington; that in 1907–1908 I was assistant designer for the architectural firm of Geo. B. Post & Sons, New York, who were the architects for the Olympic Hotel at Seattle, and while in their employ I worked on the City College of New York, Wisconsin State Capitol, Cleveland Trust Co. Building, at Cleveland, and several other buildings. In 1909–11, I had charge of the office of Saunders & Lawton, architects at Seattle, and while in their employ designed the State Reformatory Building at Monroe, the For-

estry Building at the Exposition on the University of Washington grounds, the Alhambra Theater, now Livingston Bros., Crane Co. Building, and several other public buildings. In 1912–13, I was in the contracting and engineering business with A. W. Quist Construction Co., and built the Times Building. In 1915–16 I designed the Ames Ship Yard and several other shipyards on [66] the Coast; in 1919–22, designed the Elks Club building in Olympia, Washington, and also in Centralia, Washington; built school buildings at Olympia. Since 1922 I have been in practice in Seattle, and have designed the Elks Club at Port Angeles and other buildings there; the Greenwood Block at 85th and Greenwood in Seattle, and other store buildings and residences in the city of Seattle.

That at the request of the attorneys for the defendants in the above-entitled cause, I examined the premises at or near Redondo Beach, in King County, Washington, comprised and consisting of a dwelling-house; that the said building is a new frame structure, and there are no exterior walls upon the said premises upon which the building does not rest; that the dwelling-house consists entirely of a single structure, and the part of the premises in which it is alleged there was a still is within the confines of the said dwelling-house, and a part of the foundation upon which the dwelling-house rests; that immediately above said particular part of the premises just referred to, and in which it is alleged there was a still, is the kitchen and a bathroom of the said dwelling-house.

That I have read the affidavit of Charles H. Griffith, regarding said structure, and made my examination for the purpose of ascertaining the truth or falsity of said affidavit; that the said house in question is located on a mound, but there is no tunnel from the outside, into the basement on a water level, or otherwise; that the cement walls of the basement, in what is referred to in the affidavit of said Griffith, are distillery rooms, are not of recent cement and construction, but are the original foundation walls of the said structure; that the main part of the basement and foundation follows the outline of the house, but the same is not rectangular, and what is referred to as distillery rooms, are not built off to the side of the main structure, as it is all a [67] main part of the house, and there are no foundations built off to one side of any structure that are not the walls of the main part of the house; that the rooms referred to as the distillery rooms, which the said affidavit states are not under the kitchen, are under the kitchen of said house, and that there is no old outside lean-to, to said porch or said premises, which is used for the purpose of storing household utensils, vegetables and other uses, but that the said part of the house is the kitchen, and there is no old lean-to whatsoever upon said premises.

That attached hereto, specifically referred to and by reference made a part of this affidavit, is a correct sketch made by me of the entire structure upon which the said dwelling-house rests, containing all of the premises in question.

Referring again to the affidavit of said Griffith, that the still-room was without and beyond the main foundations of the said house, and that only the back porch of the house and no other part of the house was over the room referred to as the still-room, is false and untrue; that the part of the premises comprising the said room referred to as a still-room is a part of the main foundations of the structure, and that over said part are the kitchen and bathroom of the said dwelling-house.

And further affiant saith not.

J. CHARLES STANLEY.

Subscribed and sworn to before me this 27th day of November, 1928.

[Seal] EDWARD H. CHAVELLE,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Dec. 3, 1928. [68]

[Title of Court and Cause.]

MOTION IN ARREST OF JUDGMENT.

Come now the defendants, and move the Court to arrest judgment and sentence herein, upon the ground and for the reason, among others:

1. That the evidence introduced at the trial was insufficient to sustain the verdict rendered herein.

Dated at Seattle, this 5th day of December, 1928.

EDWARD H. CHAVELLE,
JOHN B. WRIGHT,
Attorneys for Defendants.
315 Lyon Building, Seattle, Washington.

Received a copy of the within motion in arrest of judgt. this 5th day of Dec., 1928.

ANTHONY SAVAGE,
Attorney for ————.

[Endorsed]: Filed Dec. 5, 1928. [69]

[Title of Court and Cause.]

MOTION FOR NEW TRIAL.

Come now the defendants, and move the Court to set aside the verdict of the jury heretofore entered herein, and grant a new trial, on the following grounds:

1. Error in law committed by the trial Court in instructing the jury.
2. That the verdict was against and contrary to law.
3. That said verdict was against and contrary to the evidence.
4. Error in law committed by the trial court in refusing to grant the petition of the defendants to suppress the evidence.
5. Insufficiency of the evidence to justify the verdict.

6. Errors of law occurring during the trial, and excepted to by the said defendants.

Dated this 4th day of December, 1928.

EDWARD H. CHAVELLE,
JOHN B. WRIGHT,
Attorneys for Defendants.
315 Lyon Building, Seattle, Washington.

Received a copy of the within motion for new trial this 5 day of Dec., 1928.

ANTHONY SAVAGE,
Attorney for ————.

[Endorsed]: Filed Dec. 5, 1928. [70]

[Title of Court and Cause.]

SENTENCE (FRANK ALVAU).

Comes now on this 4th day of December, 1928, the said defendant, Frank Alvau, into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says, save as he before hath said.

WHEREFORE, by reason of the law and the premises, it is CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant is guilty of knowingly, willfully, unlawfully and feloniously making and fermenting certain intoxicating liquor as charged in Count I of the Indictment; of

knowingly, willfully, unlawfully and feloniously using a certain still for the purpose of distilling spirits as charged in Count 2 of the Indictment; of knowingly, willfully, unlawfully and feloniously carrying on a business of a distiller of spirits as charged in Count 3 of the Indictment, all in violation of Sections 3266, 3281 and 3282, Revised Statutes, and that he be punished by being imprisoned in the Jefferson County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States, for the period of eight (8) months on each count, said term of imprisonment to run concurrently and not consecutively, and to pay a fine of $1,000.00. And the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

On motion of counsel for defendants for stay of execution for the purpose of filing a motion for a new trial the defendants are granted twenty-four hours in which to file a motion for new trial and stay of execution is granted for that time.

Recorded in Judgments and Decrees No. 6, at page 77. [71]

[Title of Court and Cause.]

SENTENCE (HUMBERT ROSSI).

Comes now on this 4th day of December, 1928, the said defendant, Humbert Rossi, into open court

for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him, and he nothing says, save as he before hath said.

WHEREFORE, by reason of the law and the premises, it is CONSIDERED, ORDERED AND ADJUDGED by the Court that the defendant is guilty of knowingly, willfully, unlawfully and feloniously making and fermenting certain intoxicating liquor as charged in Count I of the Indictment; of knowingly, willfully, unlawfully and feloniously using a certain still for the purpose of distilling spirits; of knowingly, willfully, unlawfully and feloniously carrying on a business of a distiller of spirits, as charged in Count 3 of the Indictment, in violation of Sections 3266, 3281 and 3282, Revised Statutes, and that he be punished by being imprisoned in the Jefferson County Jail or in such other prison as may be hereafter provided for the confinement of persons convicted of offenses against the laws of the United States for the period of eight (8) months on each count, said term of imprisonment to run concurrently and not consecutively, and to pay a fine of $1,000.00; and the defendant is hereby remanded into the custody of the United States Marshal to carry this sentence into execution.

On motion of counsel for defendants for stay of execution for the purpose of filing a motion for a new trial, the defendant is granted twenty-four

hours in which to file a motion for a new trial and stay of execution is granted for that time.

Recorded in Judgment and Decrees No. 6, at page 77. [72]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To the UNITED STATES OF AMERICA, Plaintiff, and to ANTHONY SAVAGE, United States District Attorney, Attorney for Plaintiff:

PLEASE TAKE NOTICE, that the above-named defendants, Frank Alvau and Humbert Rossi, through their attorneys, Edward H. Chavelle and John B. Wright, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the verdict rendered in the above-entitled action, and from the judgment and sentence thereon, and from each and every order and ruling made during the trial of said action, adverse to these defendants.

Dated this 12th day of December, 1928.

EDWARD H. CHAVELLE,
JOHN B. WRIGHT,
Attorneys for Defendants.
315 Lyon Building, Seattle, Washington.

Received a copy of the within notice of appeal this 12th day of Dec., 1928.

ANTHONY SAVAGE,
Attorney for ————.

[Endorsed]: Filed Dec. 12, 1928. [73]

[Title of Court and Cause.]

PETITION FOR APPEAL.

To the Honorable GEORGE M. BOURQUIN, Judge of the District Court Aforesaid:

Come now the defendants, Frank Alvau and Humbert Rossi, by their attorneys, and respectfully show:

I.

That on the 4th day of December, 1928, the duly impanelled jury in the above-entitled cause, found a verdict of guilty against these defendants, upon the indictment herein; that thereafter, judgment was pronounced and entered in said cause against these defendants, wherein and whereby it was adjudged that the defendant Frank Alvau be imprisoned in the County Jail of Jefferson County, Washington, for a period of 8 months and pay a fine of $1,000.00, and the defendant Humbert Rossi be imprisoned in the Jefferson County Jail for a period of 8 months, and pay a fine of $1,000.00.

II.

That on said judgment and the proceedings had prior thereto, in this cause, certain errors were committed to the prejudice of these defendants, all of which are more in detail set forth in the assignments of error, which is filed herewith.

III.

Your petitioners, said defendants, feeling themselves aggrieved by said verdict and judgment en-

tered thereon as aforesaid, [74] hereby petition this Honorable Court for an order allowing them to prosecute an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of said court in such cases made and provided, your petitioners having submitted and filed their bonds on appeal as provided by statute, and as heretofore fixed by the Court herein.

WHEREFORE, your petitioners, the defendants, pray an order allowing appeal in their behalf to said United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in said Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in said cause, be duly authenticated, and that further proceedings be stayed until the determination of such appeal by the said Circuit Court of Appeals.

EDWARD H. CHAVELLE,
JOHN B. WRIGHT,
Attorneys for Defendants.
315 Lyon Building, Seattle, Washington.

Received a copy of the within petition for appeal this 12th day of Dec., 1928.

ANTHONY SAVAGE,
Attorney for ————.

[Endorsed]: Filed Dec. 12, 1928. [75]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR.

Come now the defendants, Frank Alvau and Humbert Rossi, by Edward H. Chavelle and John B. Wright, their attorneys, and in connection with their petition herein, they severally assign the following errors which they aver occurred on the trial of said cause, which were duly excepted to by them, and upon which they severally rely to reverse the judgments entered against them herein.

The District Court erred as follows:

1. In denying the defendants' petition to suppress the evidence, which motions were separately and severally made for each of said defendants before the case was called for trial, and which motions were renewed and denied after the Government had rested its case, and which motions were renewed and again denied before the defense rested its case, and at the end of the entire case before th Court instructed the jury, for the reason that the dwelling-house of the defendants was entered and searched, and the seizure made of the articles, without a search-warrant, in violation of the constitutional rights of the said defendants, and that said search and seizure were illegal and unlawful.

2. In denying the defendants' motion to strike the testimony, which motions were separately and severally made for each of said defendants, after the Government had rested its case on direct, and again at the end of the entire case, for the reason

and upon the [76] ground that the said evidence was incompetent, irrelevant and immaterial, and based upon an illegal and unlawful search and seizure of the property of the defendants, and an invasion of the constitutional rights of the said defendants, in that their dwelling-house was searched in the night-time, without a search-warrant therefor, and that the evidence was illegally and unlawfully seized by reason of said unlawful search, and that all of the testimony was procured by reason of said unlawful and illegal search and seizure.

3. In denying the defendants' motions for a directed verdict, which motions were separately and severally made for each of said defendants at the close of the Government's case, and again at the close of the entire case, for the reason and upon the ground that sufficient evidence had not been produced to constitute a crime, and that there was no evidence except that procured by the unlawful search and seizure without a search-warrant, of a dwelling-house, and property had been seized in violation of the constitutional rights of the said defendants.

4. In denying the motion for a directed verdict made at the close of the Government's case, and again at the end of the entire case for the defendant Humbert Rossi, for the reason and upon the ground that the said Humbert Rossi was not required to file the bond or pay the tax as charged in Counts 2 and 3 of said Indictment, for the reason that all of the evidence only tended to show that said Rossi was an aider and abettor and the principal only

could be liable for the said tax and the said bond as charged in said counts.

5. In admitting the exhibits of the Government, consisting of parts of a still and also two specimens of intoxicating liquor, for the reason and upon the ground that the same were illegally and unlawfully seized in a search of a dwelling-house in the night-time, in violation of the constitutional rights of the said defendants. [77]

6. The Court erred in instructing the jury as follows:

> "As to the evidence in this case, as the Court has stated to you it is its duty to pass upon the competency and admissibility of the evidence, and when it has done so and allows it to go in evidence, all question in respect to that are in the case and you accept the evidence and consider it. The officers go out to this place occupied by the defendant Alvau and his family, a little farm, house and barn, as they had a right to do. They had a right to do it for several reasons: First, that it is a violation of the revenue laws, and these same revenue laws provide that the officers of the Government have a right to enter a distillery at any time and discover who is operating it, gauge the liquors, and to assess and collect the taxes, and to destroy contraband utensils and production. So they entered properly, as the Court says, they find Alvau upstairs; after a long search they discover this distillery. You can see the length to which the law-breaker goes to

> foil the efforts of the Government to maintain the laws and to punish the criminal. It took them several hours to find the secret opening into this distillery, in the basement."

in that the Court instructed the jury to the effect that Government agents had a right to enter a dwelling-house at any time, to search for a distillery, without a search-warrant, to which the defendants and each of them separately and severally excepted, as being contrary to law, and in this case in violation of the constitutional rights of said defendants.

7. The Court erred in instructing the jury as follows:

> "The credibility of the witnesses is for you. That applies as well to the defendants, when they testify, as to any other [78] witness. You see them, you observe their demeanor, take note of the reasonableness or of the unreasonableness of their statements to you. Are they attempting simply to deceive you by unreasonable statements? Are they counting upon a lack of intelligence in the jury-box to persuade you to believe any sort of a puerile and silly story? Remember, you are not obliged to believe a thing is so simply because some witness swears it is so. A witness can swear to anything, but whether it is to be believed or not is a matter for your judgment. As my predecessor in Montana, Judge Knowles, used to say, you are not obliged to believe anything solely because it is sworn to. A witness may take

the witness-stand and swear strongly that down the street he saw an elephant climb a telegraph pole, but you are not obliged to believe it, even if he takes you down and shows you the pole. I tell you, Gentlemen of the Jury, I have heard them just about swear to that in court, and so have you. Your judgment will determine where to place credibility and not allow yourselves to be deceived or to be deluded by the statements that have no basis other than in the heart of the man who has no thought of his oath on the witness-stand. There is a maxim of the law that a witness false in one particular should be distrusted in others, and if your judgment approves you can reject all his testimony.

As to the evidence in this case, as the Court has stated to you it is its duty to pass upon the competency and admissibility of the evidence, and when it has done so and allows it to go in evidence, all questions in respect to that are in the case and you accept the evidence and consider it. The officers go out to this place occupied by the defendant Alvau [79] and his family, a little farm, house and barn, as they had a right to do. They had a right to do it for several reasons: First, that it is a violation of the revenue laws, and these same revenue laws provide that the officers of the Government have a right to enter a distillery at any time and discover who is operating it, gauge the liquors, and to assess and collect the

taxes, and to destroy contraband utensils and production. So they enter properly, as the Court says, they find Alvau upstairs; after a long search they discover this distillery. You can see the length to which the law-breaker goes to foil the efforts of the Government to maintain the laws and to punish the criminal. It took them several hours to find the secret opening into this distillery, in the basement. And when they get in there, what do they find? They find Rossi in there, and they find the still. The still had been operating. It was operating when they went there—they smelled its operation. They find a still five feet in diameter; they find a thousand gallons of mash, a full-fledged distillery, Gentlemen of the Jury, and the three officers, Carr, Griffith and Kinnaird, all told you that Rossi told them he came there the day before to work a while with and for Alvau.

Now, Rossi takes the stand and tells you that he just was out there on some business of renewing insurance policies, and, hearing a clamor outside, Alvau hid him there to hide him from prospective burglars, although the children and wife were allowed to take their chances with the desperate burglars that were expected to be outside; and he says he was not working there at all, did not know anything about this [80] still; that it happened that he got up and simply put on Alvau's overalls instead of his own clothes because his had fallen down; that is his statement of how he

came to be in this guilty situation which the officers have described. He denies that he told them he was working there, also. Which do you prefer to believe, the three officers of the United States, the police, the Sheriff of the United States, the same as the police and sheriff of the states, with a duty to discharge and discharging it under great difficulties always, as you well know, or will you believe the man who is charged with serious offenses, the consequence of which will be serious to him, at the lightest, if convicted? And ask yourselves whether his self-interest, which is the strongest motive that moves any man to act, has inspired him to state to you this account of his situation there in order to persuade you to believe it, or hoping that there is a fellow feeling in the breast of some juror which would inspire him to accept it, or at least to entertain a reasonable doubt, so as to secure an acquittal and go free of these offenses, if committed. It is not necessary that he should have owned the still or the premises. He who aids another to violate the law is himself as guilty as the principal actor. One who gets another to commit a crime for him, and it is committed, is as guilty of the act as he who did commit it. If one man employs another to work on a still which is running in violation of the law, the man employed is as guilty as the employer.

So that is the situation and the case for you, Gentlemen of the Jury. The Court need not

go over the evidence any further. [81] Because the Constitution of Washington, adopted by the Constitutional Convention, and ratified by a popular vote of the people before the admission of the State into the Union, expressly forbids a Judge in instructing a jury, to comment on the evidence in the case in its instructions to the jury, the District Court erred in commenting on the evidence in its instructions to the jury; and for the further reason that the instructions of the Court prevented the jury from functioning and doing its duty as sole and exclusive judges of the facts, thereby denying the defendants the right of trial by jury."

8. The Court erred in admitting Government's exhibits, over the objection of counsel for the defendants:

Mr. DeWOLFE.—We offer these in evidence —1 to 8.

The COURT.—Admitted.

Mr. CHAVELLE.—We object to them offering these in evidence, and at this time we renew our petition to suppress the evidence.

The COURT.—The objection will be overruled for the present. When the evidence is all in, if you have made out a case showing that the evidence was illegally gotten, the Court will rule on it then.

9. The Court erred in limiting the cross-examination of the witness, Kinnaird, as follows:

The COURT.—Vacate the stand. You are referring to a transcript.

Mr. CHAVELLE.—I was trying to refresh my recollection from transcript, your Honor. Note an exception.

The COURT.—Let it be vacated.

for the reason and upon the ground that the record shows said case was continued until three o'clock in the afternoon, 80 pages of testimony were taken, and the case summed up by both sides, by 5:10 o'clock P. M. on the same day, and that the defendants were precluded [82] from having a fair trial by the restriction of the Court upon the cross-examination of the witness Kinnaird.

10. The Court erred in denying the defendants' motion to suppress the evidence, made at the end of the Government's case, as follows:

Mr. CHAVELLE.—We renew our motion to suppress the evidence.

The COURT.—It appears from the evidence of the officers, the agents of the prohibition office, that they went to this place to investigate. When they got within a distance of the house or premises they smelled fermenting mash. As they came closer to the buildings it got stronger, and as they got near the residence they smelled not only the mash but the odor of kerosene and of the still in operation.

These officers were not alone prohibition agents, but they had the authority of revenue officers. The premises was a distillery. They found this still below, that had been recently

operated, and they found the mash. That comes under the Revenue Statute. The law is that revenue officers may enter a distillery at any time to discover who is operating it, gauge the liquor, and destroy anything that is illegally being carried on, which these officers did. They cannot camouflage a distillery like this one by having the entrance in a dwelling-house so they cannot enter.

The Court rules that the evidence was legally secured and is competent. Therefore, the motion is denied.

Mr. CHAVELLE.—Exception.

The COURT.—It will be noted.

Mr. CHAVELLE.—At this time, I move to strike all the testimony— [83]

The COURT.—Motion denied.

Mr. CHAVELLE.—(Continuing.) —of each and every one of the Government's witnesses.

The COURT.—Exception.

Mr. CHAVELLE.—I make a motion at this time for a directed verdict.

The COURT.—Denied.

Mr. CHAVELLE.—Note an exception.

11. The Court erred in permitting the witness, Mrs. Mary Alvau, to testify over the objection of Frank Alvau, her husband:

Mr. DeWOLFE.—You knew the still was down there, didn't you?

Mr. CHAVELLE.—I object to that as immaterial. It is not cross-examination.

The COURT.—She may answer. Overruled.

Q. You knew the still was down there, didn't you?

Mr. CHAVELLE.—Exception, your Honor.

Mr. DeWOLFE.—What is that?

Mr. CHAVELLE.—Allow me an exception.

The COURT.—Yes.

Q. Didn't you know your husband went down there and ran the still?

Mr. CHAVELLE.—Objected to for the same reason.

A. I don't know.

The COURT.—Overruled.

Mr. CHAVELLE.—Exception.

Q. You didn't see any still paraphernalia or manufacturing articles down there at all, never have been?

A. After the federals came there I heard about lots of things and see this in there and that was—well, that is all.

Q. Who does that still belong to? It belongs to your husband, doesn't it? [84]

Mr. CHAVELLE.—Objected to as leading and suggestive and not proper cross-examination.

The COURT.—Overruled.

A. I don't know.

Q. You don't know the still belongs to him?

A. May belong to him and may not.

Mr. CHAVELLE.—Same objection.

The COURT.—I think you have pursued that far enough.

Mr. CHAVELLE.—Note an exception.

as compelling the wife to testify against her husband, contrary to the laws and statutes of the State of Washington, and an invasion of the rights of the defendant Alvau.

12. The Court erred in refusing to admit testimony taken before the United States Commissioner, which was attached to the defendants' petition to suppress the evidence, and by reference made a part thereof:

> Mr. CHAVELLE.—And the Commissioner's testimony attached to the petition to suppress.
>
> Mr. DeWOLFE.—I object to that as not proper.
>
> The COURT.—Sustained.

13. The Court erred in denying the defendants' motion for a directed verdict, to suppress the evidence, and to strike the testimony, made at the close of the case, as follows:

> Mr. CHAVELLE.—That is all. We renew our motion for a directed verdict.
>
> The COURT.—Denied.
>
> Mr. CHAVELLE.—We renew our motion to suppress the evidence.
>
> The COURT.—Motion denied.
>
> Mr. CHAVELLE.—And renew my motion to strike the testimony.
>
> The COURT.—Motion denied. [85]
>
> Mr. CHAVELLE.—And in each case I ask the Court to allow an exception.
>
> The COURT.—Exceptions allowed.

14. For all the reasons set forth in the foregoing

assignments of error, the Court erred in denying the defendants' motions in arrest of judgment.

15. For all the reasons set forth in the foregoing assignments of error, the Court erred in denying the defendants' motion for new trial.

16. The Court erred in pronouncing judgment upon each of the said defendants.

WHEREFORE, plaintiffs in error severally pray that the judgment of said Court against him be reversed and this cause be remanded to said District Court with instructions to dismiss the same, and to discharge the plaintiff in error from custody, and exonerate the sureties on his bond, and for such other and further relief as to the Court may seem proper.

EDWARD H. CHAVELLE,
JOHN B. WRIGHT,
By EDWARD H. CHAVELLE.
Attorneys for Plaintiffs in Error.
315 Lyon Building, Seattle, Washington.

Copy rec'd Dec. 12, 1928.

DeWOLFE,
Asst. U. S. Atty.

[Endorsed]: Filed Dec. 12, 1928. [86]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

Come now the defendants, by their attorneys, Edward H. Chavelle and John B. Wright, and file

herein and present to the Court their petition praying for the allowance of an appeal and assignment of error intended to be urged by them, praying also that a transcript of the records and proceedings and papers upon which judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District, and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow the appeal of the defendants, upon the said defendants each giving bond according to law, in the sum of $1,500.00 each.

Dated at Seattle, Washington, this 13th day of December, 1928.

BOURQUIN,
Judge.

Received a copy of the within order allowing appeal this 13th day of Dec., 1928.

ANTHONY SAVAGE,
Attorney for ————.

[Endorsed]: Filed Dec. 13, 1928. [87]

APPEAL BOND (FRANK ALVAU).

KNOW ALL MEN BY THESE PRESENTS: That we, Frank Alvau, as principal, and the New Amsterdam Casualty Company, as sureties, jointly and severally acknowledge themselves to be indebted to the United States of America, in the

sum of Fifteen Hundred Dollars, lawful money of the United States, to be levied on our goods and chattels, land and tenements, upon the following conditions:

The condition of this obligation is such that whereas the above-named defendant Frank Alvau was on the 4th day of December, 1928, sentenced to serve eight months in the King Co. jail and pay a fine of $1,000.00 in the above-entitled cause;

AND WHEREAS said defendant has sued out a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit to review such judgment;

AND WHEREAS the above-entitled court has fixed the defendant's bond to stay execution of said sentence in the sum of $1,500.00,—

NOW, THEREFORE, if the said defendant Frank Alvau shall *dilligent* prosecute said writ of error and shall render himself amenable to all orders which said Circuit Court of Appeals shall make or order to be made in the premises, and to all process issued or ordered to be issued by said Circuit Court of Appeals, and shall not leave the jurisdiction of the court without permission being first granted, and shall render himself amenable to any and all orders made or entered by the District Court of the United States, for the Western District of Washington, Northern Division, then this obliga-

tion shall be void; otherwise to remain in full force and effect.

FRANK ALVAU,
Principal.

NEW AMSTERDAM CASUALTY COMPANY. (Seal)

A. H. KEES,
Atty.-in-fact.

J. D. O'MALLEY,
Agent.

Approved this 13th day of December, 1928.

BOURQUIN,
United States District Judge.

Approved as to form.

DeWOLFE,
Assistant U. S. Attorney.

[Endorsed]: Filed Dec. 13, 1928. [88]

[Title of Court and Cause.]

APPEAL BOND (HUMBERT ROSSI).

KNOW ALL MEN BY THESE PRESENTS: That we, Humbert Rossi, as principal, and the New Amsterdam Casualty Company, as surety, jointly and severally acknowledge themselves to be indebted to the United States of America in the sum of Fifteen Hundred Dollars, lawful money of the United States, to be levied on our goods and chattel, land and tenements, upon the following conditions:

The condition of this obligation is such that

whereas the above-named defendant Humbert Rossi was on the 4th day of December, 1928, sentenced to serve eight months in the King Co. jail and pay a fine of $1,000.00 in the above-entitled cause;

AND WHEREAS said defendant has sued out a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit to review such judgment;

AND WHEREAS the above-entitled court has fixed the defendant's bond to stay execution of said sentence in the sum of $1,500.00,—

NOW, THEREFORE, if the said defendant shall render himself amenable to all orders which said Circuit Court of Appeals shall make or order to be made in the premises, and to all process issued or ordered to be issued by the said Circuit Court of Appeals, and shall not leave the jurisdiction of the court without permission being first had, and shall render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, then this obligation shall be void; otherwise to remain in full force and effect.

HUMBERT ROSSI,
Principal.

NEW AMSTERDAM CASUALTY COMPANY. (Seal)

A. H. KEES,
Atty.-in-fact.

J. D. O'MALLEY,
Agent.

Approved this 13th day of December, 1928.

BOURQUIN,
United States District Judge.

Approved as to form.

DeWOLFE,
Assistant U. S. Attorney.

[Endorsed]: Filed Dec. 13, 1928. [89]

[Title of Court and Cause.]

STIPULATION FOR EXTENDING TIME FOR LODGING BILL OF EXCEPTIONS, EXTENDING TERM OF COURT AND FOR LODGING RECORD (Filed December 12, 1928).

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective attorneys, that the time of the defendants for filing and serving and settling their proposed bill of exceptions herein be extended to and including the 7 day of January, 1929; that the present term of this court be extended for all purposes of this action until said bill of exceptions shall have been settled and certified; and that the time for filing the record with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and for docketing said cause, be extended until thirty days after the bill of exceptions has been settled and certified.

Dated at Seattle, Washington, this 12th day of December, 1928.

TOM DeWOLFE,
Asst. U. S. District Attorney.
EDWARD H. CHAVELLE,
JOHN B. WRIGHT,
By EDWARD H. CHAVELLE,
Attorneys for Defendants.

[Endorsed]: Filed Dec. 12, 1928. [90]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR LODGING BILL OF EXCEPTIONS, EXTENDING TERM OF COURT AND FOR LODGING RECORD (Filed December 13, 1928).

Upon reading and filing the foregoing stipulation, IT IS HEREBY ORDERED that the time of the defendants herein, for serving and filing their proposed bill of exceptions herein, be and the same is hereby extended to and including the 31 day of December, 1928; that the present term of court be and the same is hereby extended for all purposes of this action until said bill of exceptions shall have been settled and certified; and that the time for filing the record with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit and for docketing said cause be and the same is hereby extended until thirty days after the settlement and certification of said bill of exceptions.

This 5th day of December, 1928.

BOURQUIN,
District Judge.

[Endorsed]: Filed Dec. 13, 1928. [91]

[Title of Court and Cause.]

ORDER EXTENDING TIME FOR LODGING BILL OF EXCEPTIONS, EXTENDING TERM OF COURT, AND FOR LODGING RECORD (Filed January 21, 1929).

Upon reading and filing the foregoing stipulation, IT IS HEREBY ORDERED that the time of the defendants herein, for serving, filing and settling their proposed bill of exceptions herein be and the same is hereby extended to and including the 26th day of February, 1929; that the present term of court be and the same is hereby extended for all the purposes of this action until said bill of exceptions shall have been settled and certified; and that the time for filing the record with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and for docketing said cause, be and the same is hereby extended until thirty days after the settlement and certification of said bill of exceptions.

Done in open court this 21st day of January, 1929.

NETERER,
Judge.

[Endorsed]: Filed Jan. 21, 1929. [92]

[Title of Court and Cause.]

AMENDED BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 19th day of November, 1928, at ten o'clock A. M., a motion to suppress the evidence in the above-entitled cause came on for hearing before the Honorable Edward E. Cushman, Judge of the above-entitled court, and after hearing the argument for the Government and for the defendants, and taking the matter under advisement, the Court referred said petition to suppress to the Honorable George M. Bourquin.

Thereafter, on November 26, 1928, the said motion to suppress was continued before the Honorable George M. Bourquin until the 3d day of December, 1928, at ten o'clock A. M., and thereafter the motion to suppress the evidence in said cause was continued to two o'clock P. M. on the same day. Plaintiff was represented by Mr. T. E. DeWolfe, Assistant United States District Attorney, and the defendants were represented by their attorney, Mr. Edward H. Chavelle.

The said petition to suppress was directed to the things and articles seized at the residence and home of the defendant, Frank Alvau and his family, at Redondo, in King County, Washington, for the reasons and upon the grounds:

1. That the petitioner on or about the 12th day of July, 1928, and also subsequent thereto, resided with his family on a [93] ranch of 14 acres, consisting of a private dwelling-house which was his

residence at the time of the unlawful search and seizure complained of herein, and the private dwelling-house of the said petitioner was searched, and an unlawful seizure made therefrom without a search-warrant and without any warrant whatsoever, or authority of law, under the following facts and circumstances:

The prohibition agents in the night-time on the said 12th day of July, 1928, at about three A. M. o'clock, without any search-warrant and without any warrant whatsoever, or authority of law, battered down the door of the private dwelling-house of the petitioner and his family, breaking the door sill and the lock that securely fastened the same, and without due process of law or any legal authority whatsoever, unlawfully and wrongfully entered the private dwelling-house of the said petitioner and his family, and proceeded to search the said dwelling-house, stating to said petitioner that they were prohibition agents, and upon being requested for their authority and a search-warrant, they stated that they did not need a search-warrant, but had a right to search without any warrant whatsoever.

Thereafter the said search continued for a period of nearly five hours, and during said period the said officers moved about the personal belongings of the said petitioner in the said premises, and unlawfully and illegally searched and seized certain articles belonging to the said petitioner, without any search-warrant whatsoever, in violation of the constitutional rights of said petitioner under

the Fourth and Fifth Amendments to the Constition of the United States, and in violation of Article I, Sections 6 and 9, of the Constitution of the State of Washington, guaranteeing a person against unlawful search and seizure in his home.

2. That no business of any kind was transacted or carried [94] on in petitioner's said dwelling-house by petitioner, and no intoxicating liquor was unlawfully sold thereon, and the said dwelling-house was used solely as a private dwelling, by petitioner and his family.

3. That there was no affidavit or complaint upon which a lawful and valid search-warrant could issue, showing that intoxicating liquor containing more than one-half of one per cent by volume, and fit for use for beverage purposes, was unlawfully sold in the said dwelling-house; that there was no complaint or affidavit which set forth facts upon which probable cause for belief that such intoxicating liquor was so possessed or could be found could be based.

4. That there was no complaint or affidavit whatsoever containing a statement of facts upon which the existence of probable cause for the issuance of a search-warrant could be found.

5. That there was no complaint or affidavit describing the premises directed to be searched, or any search-warrant whatsoever, and the said premises were not particularly and definitely described in any search-warrant directed against said premises. There was no search-warrant executed by a person to whom it could have been directed.

6. That without any warrant whatsoever a private dwelling-house in which intoxicating liquor was not unlawfully sold was searched.

And the affidavit attached to the petition to suppress alleges that the said dwelling-house consists of six rooms and basement, located on 14 acres of land belonging to Frank Alvau; that he had lived in the said premises with his family for a period of more than two years prior to the 12th day of July, 1928, and on said day and subsequent thereto, and at the time of making his affidavit was [95] still living in the premises. That on the 12th day of July, 1928, at about three o'clock A. M., certain prohibition agents entered said premises of the said Frank Alvau, by battering down a door to the dwelling-house, which was securely fastened and locked, and breaking the sill of said doorway and the said lock, and entered the said dwelling-house and proceeded to search the same, without any legal or lawful search-warrant, and without any warrant whatsoever, and took from the premises certain articles belonging to the said defendant, in violation of the Constitutional rights of said defendant under the Fourth and Fifth Amendment to the Constitution of the United States, and in violation of the Constitution of the State of Washington, Article I, Section 6 and 9.

Thereupon the following proceedings were had:

Mr. CHAVELLE.—I am ready for trial, except that there is a petition to suppress, which I understand your Honor is going to—

The COURT.—I will pass on it after I have heard the trial.

Mr. CHAVELLE.—May I make the motion, so that the record will show it was timely made.

The COURT.—Yes.

Mr. CHAVELLE.—In a few words, it is this, that the private dwelling-house of the defendant Frank Alvau was searched in the night-time without a search-warrant.

The COURT.—Haven't you your motion on file?

Mr. CHAVELLE.—Yes.

The COURT.—What is it you want to do?

Mr. CHAVELLE.—For the purpose of making the record, for the [96] purpose of permitting the Court to rule and allow me an exception, I wanted to show that the motion was disposed of or came up timely. It has to be made.

The COURT.—The record will show for itself. It shows that it is filed. The Court has said it will not hear it until it hears the trial of the whole case. It will be tried together. If you are entitled to the final motion, you will get it then.

Mr. CHAVELLE.—Will your Honor allow me an exception to the Court's ruling?

The COURT.—Yes. (Tr., p. 2.)

Thereupon further hearing of the case was continued until three o'clock P. M. of the said 3d day of December, 1928. The Court proceeded to empanel the jury to try the case, and said jury was duly empaneled and sworn. Opening statements were made on behalf of the respective parties, whereupon the following proceedings were had:

TESTIMONY OF C. H. GRIFFITH, FOR PLAINTIFF.

Thereupon C. H. GRIFFITH was called as a witness for the plaintiff, and after being duly sworn, testified:

I am a Federal Prohibition Agent. On the morning of the 12th of July, 1928, I went to the premises of the defendant Frank Alvau, located in King County, at about five o'clock in the morning. At a point 500 yards or possibly a little more from the house, we smelled the odor of fermenting mash. We thought it was in the barn. We went first to the barn but there was nothing there, and going on around the barn between the house and the barn, we then smelled the mash strong and could smell the kerosene burners. The house is set upon a high knoll. There was a full concrete basement under the house, a back door and front door. One of the boys [97] went to the front door, another to the back door, and I went to the basement door. I examined into the basement and called out and told them who we were. No one came to the door and no one answered. I heard someone running across the basement floor as I pushed the basement door in with my shoulder, and saw someone disappearing up the steps. I went after them, up the steps to the kitchen and then to the second story, and found the defendant Alvau. I took him again to the basement below and returned to the house to look through it. There was

(Testimony of C. H. Griffith.)

no evidence of the still in the house. The basement was searched. We then went out doors to find a runway leading into the basement. Two of the boys then returned to town. When they came back we found a round vault door leading out of the basement. In this we found a thousand gallons of mash, a 200-gallon still, 40 gallons of whiskey, and the defendant Rossi. The still had just been shut down.

Q. I ask you if you saw a mash vat outside, or a disposal vat out in the yard?

Mr. CHAVELLE.—Objected to as leading and suggestive.

The COURT.—Overruled.

A. What kind of a vat?

Q. (Mr. DeWOLFE.) A mash disposal vat.

A. No, a sump pit,—

Mr. CHAVELLE.—I object to that as not responsive and ask to have it stricken. He says "No."

Q. (Mr. DeWOLFE.) Describe the pit you are speaking about.

A. It was just a sump for the aforesaid mash to be disposed of—rocks and such, dirt on top.

Q. Did you see it before you entered the house?

A. Yes.

Q. And did you smell mash coming out from that pit there? [98] A. Yes.

Mr. CHAVELLE.—Objected to as leading.

The COURT.—Yes. He has answered.

(Testimony of C. H. Griffith.)

Q. How much mash was in there—disposed of mash in the pit?

A. You could not state it—how much of it seeped through the ground.

Q. State whether or not it was steaming.

A. It was steaming.

Mr. CHAVELLE.—It is all leading. I would like to have counsel cautioned.

The COURT.—It is not too leading. I do not think there could be any dispute over any of these facts.

Rossi stated that he worked for some insurance company, but had gone out to work for a few days for Alvau, and had gone out the night before and was working for him then. Alvau explained the construction of the basement to me, that the still was in, and explained how he made the door, which weighed about 500 pounds, explained how he got the still in there. The still-house was out to one side. The vault door led out of the basement into a two-story still-house built of concrete about eight inches thick, the walls, even the concrete ceiling. He had built a door leading from the basement of the house into the still. The door was about two feet in diameter. None of it was under the main part of the house. There was a little lean-to built out to the rear, running along the basement steps, that was over the still-house, as I recall it. The porch was used to store foods in—potatoes. The still contained two pressure tanks and burners and coil. There was a mash tank with 500 gallons of mash.

(Testimony of C. H. Griffith.)

In my opinion the still was made there and the dwelling-house constructed around it. There was a cold air shaft from the still to a well about 75 or 100 feet distant. [99]

Q. Did you discover that prior or subsequent to the time of the entry of the house proper?

A. After.

I arrived on the premises about 5 or 6 o'clock in the morning. I went up on the roof to smell the chimney and smelled the fumes up there. (Tr., pp. 3–13).

On cross-examination, the witness further testified as follows:

Q. Mr. Griffith, they had no search-warrant?

A. No, sir.

Q. And you searched the dwelling-house?

A. Well, I looked around it, was through it.

I had been requested by a superior officer to go out to the dwelling-house and look for a still.

Q. As a matter of fact, the premises were all—the dwelling-house rested completely upon the foundaton that you speak of, there was no outside—

A. Which foundation?

Q. The protrusion—there was no part of the premises that protruded past the foundation of the dwelling-house?

A. Well, there is a square foundation that the dwelling-house proper sat on, and then there is an offset that the still-house was under, of about eight feet.

(Testimony of C. H. Griffith.)

Q. And there was nothing over that except this lean-to porch?

A. That is it, nothing else.

Q. And the kitchen and bathroom were not over that? A. No, the kitchen was over the—

Q. I asked you if the kitchen and bathroom—answer the question, will you? A. No, sir. [100]

Q. How many times were you out there, more than once? A. Twice.

Q. What particular times were you out there?

A. I went into town and got the agent to come out.

Q. You were out there twice the same day?

A. Yes.

Q. That is the only time you saw the premises?

A. Yes.

I do not remember who was present when Rossi made his statements to me. (Tr., pp. 13–16.)

On redirect examination, the witness further testified as follows:

Government's Exhibits 1 to 8, inclusive, were taken from the still-house of Alvau. Government's Exhibits 1 and 2 are samples of moonshine taken from the 40-gallon barrel and a sample of the mash or moonshine taken from one of the mash vats. The mash shown and the distilling apparatus were taken to Tacoma and placed in the custody of Agent Kinnaird. (Tr., pp. 16–17.)

TESTIMONY OF H. E. CARR, FOR PLAINTIFF.

Thereupon H. E. CARR was called as a witness for the plaintiff, and after being duly sworn, testified:

I am a prohibition agent, and went to the premises of the defendant Alvau on the 12th of July, 1928. We smelled the odor of fermenting mash and followed the odor across the field to the barn. Searched the barn and found nothing. From the south side we walked around to the north side of the barn toward the house and again smelled the mash and at this time could also smell hot kerosene. I went to the backdoor of the dwelling-house, Agent Griffiths to the basement door and Agent Raney to the front door. I knocked on the rear door and told them I was a Federal officer, and [101] to open the door. No one came to the door, and after a while I could hear Agent Griffith break into the basement door. In a short time he came to the back door where I was and unlocked the door. At this time he had the defendant Alvau with him. We then went to the basement to see if the still was there. Could not find it, and we then made a search around the outside of the premises, and we could find no way to get into the still. The house was built on a rise in the ground. We went back to town and returned to the premises about 7:30 or 8 o'clock with Agent Kinnaird. After about a half hour's search Mr. Kinnaird found the opening in

(Testimony of H. E. Carr.)

the northeast corner of the basement that led into the still. In there was the defendant Rossi dressed in common blue shirt, a pair of blue overalls and a pair of shoes and stockings. He had no underwear on. The temperature of the room was very hot. In the first room was a 500-gallon vat of steaming mash, and the dome of the still coming up from the floor below. In another corner was a manhole leading to the room below. In this room was another 500-gallon vat of mash and the steam was so hot you could not put your hand on it until the heat had been turned off. To the right were 2 15-gallon pressure tanks embedded in concrete. There were numerous other articles found. The still-house was between the back porch and the house. On the back porch were brooms and mops and a basket of vegetables. The wall between the basement and the still-room was 6 inches thick, and the entrance to the still-room from the basement was about 2 feet in diameter, and the still was about the same width. It was about four or five hundred yards from the premises that we first smelled the odor of mash emanating from the premises. I had no conversation with Mrs. Alvau in the presence of the defendant. Prior to the seizure of the still I went into the kitchen and had a cup of coffee, but did not interfere with any of the personal belongings [102] of the defendants, other than the still apparatus, moonshine and mash. The rest of the outfit was destroyed. There was a tunnel dug under the floor of the basement to the chimney of the

(Testimony of H. E. Carr.)

house, which ran the entire depth of the house. There was another tunnel from the right side of the house to a well about 50 feet distant, which was a fresh air vent. Rossi said that he came there the night before to work for Mr. Alvau. No one said in my presence that anyone shut off the still. Government's Exhibits 1 to 8 inclusive are known to me. Government's Exhibit 1 is a sample of the whiskey that was taken from the 50-gallon barrel in the still on July 12th. No. 2 is a sample of the mash that was taken from a 500-gallon vat in the still. No. 3 was in the mash vat and used for heating the mash. No. 4 is the top of the dome of the still, and 6, 7 and 8 are the connecting parts from the dome down to the still. No 5 is the hinge used on the door into the still-house. (Tr., pp. 17–23.)

On cross-examination the witness further testified as follows:

I had no search-warrant. I made out a report in the case in which I stated the time I arrived at the premises. I do not think I stated that I got there at three o'clock in the morning. I imagine that Mr. Kinnaird made the case report. I always advise Mr. Kinnaird when he is not there, what happens prior to his getting there, but I do not know whether I told him in this particular case.

Q. You say that the part that you call the still-room was outside—what, protruded out away from the foundation of the house? A. Oh, yes.

(Testimony of H. E. Carr.)

Q. And it was not directly under the kitchen of the house and the bathroom of the house?

A. No, sir. [103]

Q. And that there was some sort of a lean-to there, or porch, on the house? A. There was.

Q. And where did the lean-to on the porch come in? A. On the kitchen.

Q. The kitchen? A. Yes.

Q. And that was filled with utensils, cooking utensils or some kind of utensils, you say, there?

A. Yes, there was just—

Q. You heard Agent Griffith break into the premises? A. I did.

Q. Were you attacked by the defendant Alvau, by a gun? A. No, I was not.

Q. I am referring to your affidavit, which has been offered in this case, in resistance to the petition to suppress, and ask you if you there swore that—

Mr. DeWOLFE.—Is that on file?

Mr. CHAVELLE.—Yes.

Q. (Continuing.) "That before reaching the premises of said defendant Alvau the defendant Alvau came out from said premises and attempted to drive this agent, and the other Federal Prohibition Agents from the vicinity with a gun."

A. That is my affidavit, yes, sir.

Q. Is that true? A. It is not.

Q. It is not true.

Mr. CHAVELLE.—I will offer this in evidence.

(Testimony of H. E. Carr.)

Q. That is sworn to by you. The original is on file.

The COURT.—Let him see it. [104]

Q. You made that affidavit?

A. The affidavit was made. I signed it.

The COURT.—The question is: Did you make an affidavit with that in it? Do you want to examine the affidavit?

A. I made an affidavit with that in it, yes.

Q. And it is not true? A. It is not.

Q. The 15th day of October, 1928, is the affidavit, and that is your signature? A. Yes.

Q. Sworn to before A. C. Bowman, United States Commissioner? A. Yes, sir.

Mr. CHAVELLE.—That is already in evidence, I assume, your Honor.

The COURT.—No, no, we try this case on the testimony here. We will have no affidavits unless you introduce it to impeach him.

Mr. CHAVELLE.—I will offer it in evidence.

(The affidavit above referred to was marked Defendants' Exhibit 9.)

The dwelling-house was located on a large piece of land, in a high state of cultivation, garden, etc. We searched until about 7 o'clock. Mr. Raney and I went to town and returned with Mr. Kinnaird, about eight o'clock, and after a half hour or hour's search the still was found then. (Tr., pp. 23–28.)

On redirect examination the witness further testified as follows:

I was not chased by the defendant Alvau with a

(Testimony of H. E. Carr.)

gun. I made a mistake in the affidavit because I thought it was the same affidavit I had read at some other time, and later I executed an [105] affidavit correcting the mistake. (Tr., pp. 28, 29).

On recross-examination the witness further testified as follows:

I do not know whether the new affidavit was ever served or filed. I am in the habit of reading affidavits that I make before I swear to them. I read this affidavit, and signed it after I had read it. I read the affidavit in Mr. Whitney's office and checked out the parts—I don't remember just what they were—that I didn't want in there—because the affidavit was made by Mr. Smith. It was rewritten by one of the employees in the office and I took it over to Mr. Bowman and signed it there so I could get back to Tacoma and work that night. (Tr., pp. 29, 30).

Questioned by the Court, the witness further testified:

Q. You say you dug and found some mash. Where was this?

A. This was to the right of the house, on the edge of the property, about 25 or 30 feet.

Q. What sort of a place was it where you dug?

A. This was about six feet wide, and about 15 feet long, of loose dirt, and in the back yard—gravel or rocks. (Tr., p. 31).

(Testimony of H. E. Carr.)

On recross-examination the witness further testified:

Q. It was a cesspool, wasn't that where it was?

A. It was used as a cesspool and a drain for the mash also.

The COURT.—A drain?

A. The mash was made out of just sugar and water. There was no corn used, so that the mash would soak away in the loose dirt.

Q. (Mr. CHAVELLE.) There wasn't any drain to it, was there?

A. No, sir. (Tr., p. 31).

Questioned by the Court, the witness further testified:

Q. How much mash was there there? [106]

A. There was a thousand gallons—in the pit?

Q. Yes.

A. You couldn't see any. The opportunity we had to judge—smelling the mash that had been poured into it.

Q. (By Mr. DeWOLFE.) How did you know it was mash?

A. You could smell it. (Tr., pp. 31, 32).

On recross-examination the witness further testified as follows:

Q. You could not see, but you could smell mash?

Mr. DeWOLFE.—I object to that question.

The COURT.—Is there anything further?

Q. This was a cesspool, wasn't it?

A. It was used for both, yes, sir.

(Testimony of H. E. Carr.)

Q. It was the kind every dwelling-house has?

Mr. DeWOLFE.—I object to your testifying.

Mr. CHAVELLE.—I am not testifying.

Q. It is the customary thing that a dwelling-house in the country should have a cesspool or septic tank?

A. It was not a septic tank; it was just loose dirt.

Q. It was some distance from the house?

A. Yes.

Q. There were some flowers growing over it, weren't there? A. No, I don't think so.

Q. It was on the premises? A. Yes.

Q. There was vegetation growing there?

A. Yes. (Tr., p. 32).

Questioned by the Court, the witness further testified:

Q. How was this mash removed there, was there a pipe to it?

A. Yes, sir, we dug up, that is all, until we found the drain [107] leading from the house.

Q. What part of the house? A. Beg pardon?

Q. What part of the house?

A. To the northeast corner of the house.

Q. (Mr. DeWOLFE.) I will ask you: That is the custom, is it not, on a set-up of this kind, to have a refuge for the mash—a mash pool outside of the house?

A. Absolutely.

Q. (Mr. CHAVELLE.) This is a dwelling-house?

A. Yes. (Tr., pp. 32, 33.)

TESTIMONY OF W. H. KINNAIRD, FOR PLAINTIFF.

Thereupon W. H. KINNAIRD was called as a witness for the plaintiff, and after being duly sworn, testified:

I am a Federal Prohibition Agent in charge of the Tacoma prohibition office. I have been a Federal Prohibition Agent since August, 1921. I went out to the premises of the defendant Alvau on the 12th day of August, 1928, in response to a message from agents Raney and Carr. They had gone out before me. Before entering the dwelling-house I could smell the odors of mash and kerosene. We went in the basement and looked around, moving chairs and boxes. In the northeast corner I moved a washing-machine and I could see a lid of steel about two feet in diameter, got down and pushed on it, and the door swung partially open. I could see a man's hand. I told him to turn the lights on. I told him who I was. He turned the lights on, and Mr. Rossi came out of the hole. I put the washing-machine back and closed the hole and called the other agents and showed them the hole, and when they entered we found the mash and still and whiskey. I talked to Rossi, one of the defendants, who said he had worked for the Metropolitan Life Insurance Company until the day [108] before, when he came to the Alvau place to work. No one said anything about turning the still off. The premises consist of a frame house, sit-

(Testimony of W. H. Kinnaird.)

ting on a concrete foundation, a full concrete basement. There are concrete stairs down to the basement. The sides of the concrete steps into the basement form a portion of the still-house. Entering from the basement I went into a concrete room, and then from there was a manhole going down into another room underground, and concrete. The hole into the still-house was about 2 feet in diameter. The covering of the hole was concrete and steel and there was a vault-like door of concrete, weighing about 500 pounds. Alvau said he drew up plans for the door and had it made in Seattle, and that it cost between fifty and seventy-five dollars, and weighed about 500 pounds. I did not notice any tunnel leading outside. I knew there was a vent there, but I did not follow it. It was in one corner of the still-house, with air pressure, that air came in. Outside of the house, I noticed where some one had been digging, and it was steaming there—hot mash. Referring to Government's Exhibits 1 to 8, they were turned over to me and have been in my custody since July 12th, the date of the seizure, and have remained unchanged. I tested the moonshine and it contained more than one-half of one per cent of alcohol by volume, and was fit for beverage purposes.

Mr. DeWOLFE.—We offer these in evidence, 1 to 8.

The COURT.—Admitted.

Mr. CHAVELLE.—We object to them offering

(Testimony of W. H. Kinnaird.)

these in evidence and at this time we renew our petition to suppress the evidence.

The COURT.—The objection willl be overruled for the present. When the evidence is all in, if you have made out a case showing that the evidence was illegally gotten, the Court will rule on it then. (Tr., pp. 33–38.)

On cross-examination the witness further testified as follows: [109]

Q. Mr. Kinnaird, the premises were a dwelling-house? A. Yes, sir, it was a dwelling-house.

Q. Your agent didn't have a search-warrant?

A. Well, it is hearsay. I didn't see a search-warrant.

Q. You know there was no search-warrant?

The COURT.—They both answered that they did not.

Q. The premises belong to the defendant, Frank Alvau?

A. I could not say whether they do or not.

Q. Well, he lived there? A. Yes, he lived there.

Q. It was his dwelling-house?

A. Yes; he was living there.

Q. And he lived there with his family, his two children—his wife and his two children?

A. Yes. The place was in a state of cultivation, there was a garden and a cow.

Q. Now, you had been out in this locality before some time, before this 12th day of July, of course?

A. I had been by there, yes.

(Testimony of W. H. Kinnaird.)

Q. And you had a suspicion then that the place should be searched?

A. I had a suspicion that the place should be investigated.

Q. And that was about two weeks before the time that it was investigated? A. Yes, sir.

Q. And this suspicion arose because someone had told you that Frank had chased away people who were picking flowers? A. Yes.

Q. But you didn't bother to get a search-warrant. And how [110] far from the highway is the house—the nearest point on the highway, or how far—

A. I have only been to the premises from one way and that is from the road down to Redondo.

Q. There is a fence about the place, around the place?

A. I didn't go into the back. There is in front and along the side.

Q. You didn't go there originally with the agents? A. I did not.

Q. You sent the agents out there? A. I did.

Q. Told them to go out and investigate and see if they could find a still? A. Yes, sir.

Q. And that was based upon the information that you had secured, as you related, a couple of weeks before that time? A. Yes, sir.

Q. Did you notice the sill of the door was broken —the cellar door?

A. I don't know whether I did or not. I don't believe I did.

(Testimony of W. H. Kinnaird.)

Q. You didn't look, did you?

A. Well, I don't know whether I did or not.

Q. You had a case report made in this matter?

A. Yes.

Q. By these agents?

A. I made a report to Mr. Whitney.

Q. And did you state in the report that the agents got out there to the premises at three o'clock in the morning? A. No, sir.

Q. You didn't state that? [111] A. No, sir.

Q. Referring to your testimony before the United Sttaes Commissioner—I am now reading from a transcript of the testimony, a copy of the transcript —the original transcript is on file with the Court, attached to the petition to suppress—I will ask you whether or not in your testifying on the 20th day of July, 1928, at 2 o'clock P. M., before the Honorable H. G. Fitch, United States Commissioner, at Tacoma, Washington, you stated as follows:

"Q. Don't you keep any record of your officer's movements?

"A. I can't tell. I'll testify to what time they got out there.

"Q. Do you know?

"A. I have their record.

"Q. What time did they say they got out there? A. Three o'clock in the morning.

"Q. That is their record, is it? A. Yes."

Did you so testify at that time and place?

A. I testified that they left town about three

(Testimony of W. H. Kinnaird.)

o'clock in the morning. I told you at the hearing that I had that record. I said it was hearsay.

Q. Did you so testify? I haven't asked you for anything else.

A. Yes, I testified before the Commissioner there.

Q. When, what time they left town and what time they got out there—you heard my question.

A. That is like I told you, I say I could not tell you what time they got out there.

Q. Did you understand me? A. Yes. [112]

Q. Did you understand it perfectly?

A. Yes, sir.

Q. There is no mistake. Did you so testify?

A. I testified before the Commissioner, yes.

Q. That the agents arrived at Frank Alvau's place at three o'clock in the morning?

A. As far as I knew, yes.

Q. And according to this record?

A. I don't know whether my record shows that or not.

Q. That is what you testified to. Did you so testify?

A. I testified according to that record there.

Q. Now, this was not a saloon, or a public place or a—

The COURT.—That stands admitted. You must prepare your case out of court, on your time, not in here on my time and the jury's.

Q. Did you take anything away from the place

(Testimony of W. H. Kinnaird.)

beside the contraband, there; did you take a gun, for instance?

A. One of the agents seized a gun, yes.

Q. I will ask if you testified before the United States Commissioner in Tacoma, at the same time and place, as follows:

"Q. Had someone advised you that the still was there? A. Yes, sir."

Mr. DeWOLFE.—I object as not proper cross-examination.

Q. (Continuing.)

"Q. Told you the still was there?

"A. No. They didn't tell me the still was there, but they said it was a suspicious place, and I sent the boys out to see."

Is that what you testified to? [113]

A. Yes, sir.

Q. Now, how far is this place from Redondo?

A. I would say around a half mile.

Q. And how far is that from this courthouse?

A. I could not tell you; I said it was a half a mile from Redondo, about.

Q. And how far is it from here, do you know?

A. I don't know.

Q. And the—

The COURT.—Vacate the stand. You are referring to a transcript.

Mr. CHAVELLE.—I was trying to refresh my recollection from transcript, your Honor. Note an exception.

The COURT.—Let it be vacated. (Tr., pp. 38–44.)

Thereupon the Government rested.

Mr. CHAVELLE.—We renew our motion to suppress the evidence.

The COURT.—It appears from the evidence of the officers, the agents of the prohibition office, that they went to this place to investigate. When they got within a distance of the house or premises they smelled fermenting mash. As they came closer to the buildings it got stronger, and as they got near the residence they smelled not only the mash but the odor of kerosene and of the still in operation.

These officers were not alone prohibition agents, but they had the authority of revenue officers. The premises was a distillery. They found this still below, that had been recently operated, and they found the mash. That comes under the Revenue Statute. The law is that revenue officers may enter a distillery at any time to discover who is operating it, gauge the liquor and destroy anything that is illegally being carried on, which these officers did. They [114] cannot camouflage a distillery like this one by having the entrance in a dwelling-house so they cannot enter.

The Court rules that the evidence was legally secured and is competent. Therefore, the motion is denied.

Mr. CHAVELLE.—Exception.

The COURT.—It will be noted.

(Testimony of J. Charles Stanley.)

Mr. CHAVELLE.—At this time, I move to strike all the testimony—

The COURT.—Motion denied.

Mr. CHAVELLE.—(Continuing.) —of each and every one of the Government's witnesses.

The COURT.—Exception.

Mr. CHAVELLE.—I make a motion at this time for a directed verdict.

The COURT.—Denied.

Mr. CHAVELLE.—Note an exception. (Tr., pp. 44, 45.)

DEFENDANTS' CASE.

TESTIMONY OF J. CHARLES STANLEY, FOR DEFENDANTS.

Thereupon J. CHARLES STANLEY was called as a witness for the defendants, and after being duly sworn, testified:

By occupation I am an architect, and have been for 25 or 26 years.

Thereupon the Government admitted his qualifications in such profession.

At the request of counsel I made an examination of the premises at Redondo Beach known as the dwelling-house of Frank Alvau, and made a plan of the house, and have it with me.

(Witness produces plans.)

There are two sheets, the basement plan and the first floor plan of the house, marked for identifica-

(Testimony of J. Charles Stanley.)

tion and offered in evidence as Defendants' Exhibits 10 and 11 respectively. [115]

Q. Is there any part of the dwelling-house, any part of the basement of the dwelling-house, or the walls of the dwelling-house, that protrude beyond the dwelling-house itself? A. They do not.

Q. You have heard the testimony of Agent Carr and Agent Griffith and Agent Kinnaird here to-day. Is their testimony true or untrue?

Mr. DeWOLFE.—I object.

The COURT.—It will be for the jury to say what is true or not true.

Mr. CHAVELLE.—In relation to the part of the premises what was referred to as the still-room, what part of the dwelling-house is it that is over it?

A. It is directly under the kitchen and bathroom.

Q. Is there any lean-to in connection with the premises, or porch, back of the kitchen?

A. None, whatever.

Mr. CHAVELLE.—I will offer the exhibits in evidence (Tr., pp. 46, 47).

(The plans above referred to were admitted in evidence, and marked respectively, Defendants' Exhibits 10 and 11.)

TESTIMONY OF FRED C. CAMPBELL, FOR DEFENDANTS.

Thereupon FRED C. CAMPBELL was called as a witness for the defendants, and after being duly sworn, testified:

I am by profession an attorney at law. I have

(Testimony of Fred C. Campbell.)

examined the premises of Frank Alvau on October 30, last. The premises consist of a dwelling-house and basement. The house is considerably higher than the county road, and is about a thousand feet from the nearest road. The land surrounding the house is in a state of cultivation. It is a small ranch, chicken ranch, garden, cow and the like. I examined the foundation of the building. It is concrete, [116] extending clear around the house.

Q. Was there any part of the foundation or the walls or any concrete walls that protruded beyond the sill of the residence or the frame structure itself?

A. No. The walls of the house—the north wall of the house is a solid concrete wall, full length. There is sort of an "L" that extends out a little further than—that is, there is what you might call a notch one side where the stairway comes down into the basement; that is on the southeast corner. The north wall of the basement is solid concrete wall the whole length. That is the foundation.

Q. What is directly over the room referred to as a still-room? A. Kitchen and bathroom.

Q. Is there any lean-to or porch?

A. Not on the east end where this kitchen and bathroom are.

Q. Was there any lean-to or porch that you saw at all? A. Not on the east end of the house.

Q. Did you notice whether the sill of the basement door was broken?

A. There is a splinter or piece broken off the

(Testimony of Fred C. Campbell.)

door. I, of course, don't know how it got there. (Tr., pp. 48–50.)

On cross-examination, the witness further testified as follows:

There is no covered space over the steps leading into the house. There is no space there other than the steps, where the steps go in, to store things in. (Tr., pp. 50, 51.)

TESTIMONY OF LESTER D. UNGER, FOR DEFENDANTS.

Thereupon LESTER D. UNGER was called as a witness for the defendants, and after being duly sworn, testified:

I am manager of the Metropolitan Life Insurance Company. [117] One of the defendants, Humbert Rossi, worked for my company for about one year. His last day of pay was on July 14, 1928. He resigned his position with the company. (Tr., pp. 52, 53.)

TESTIMONY OF URBAN C. HUFF, FOR DEFENDANTS.

Thereupon URBAN C. HUFF was called as a witness for the defendants, and after being duly sworn, testified:

I am assistant manager of the Metropolitan Life. I have known Humbert Rossi for about one year. He was engaged all the time in the employment of my company. It was during July that he

(Testimony of Urban C. Huff.)
left the company. I do not remember the exact date. His general reputation for truth and veracity in the community in which he lives is good. (Tr., pp. 53, 54.)

On cross-examination the witness further testified as follows:

My opinion as to the general reputation of the defendant Rossi is based on what the neighbors say and general acquaintance. I have never made any inquiries, but I have never heard anything but good of him. I live in the same neighborhood that he does. (Tr., p. 54).

TESTIMONY OF DAVID LEVINE, FOR DEFENDANTS.

Thereupon DAVID LEVINE was called as a witness for the defendants, and after being duly sworn, testified:

I am president of the Seattle Central Labor Council. I know Humbert Rossi and have known him for eight years. He was employed in July, 1928, for the Metropolitan Life Insurance Company. I know his general reputation in the community in which he resides, for truth and veracity, and said reputation is good. I also know his general reputation in that community as to being a law-abiding citizen, and that reputation is good. (Tr., p. 55.) [118]

(Testimony of Humbert Rossi.)

On cross-examination, the witness further testified as follows:

I live four or five blocks from the defendant. (Tr., p. 56.)

TESTIMONY OF HUMBERT ROSSI, ON BEHALF OF DEFENDANTS.

Thereupon HUMBERT ROSSI, one of the defendants, after being first duly sworn, testified:

On the 12th day of July, 1928, I was working for the Metropolitan Life Insurance Company. I went out there to try to revive some insurance, that had been in existence with my company, and I had gone there to see about them being reinstated. I had insurance upon one of the members of the Alvau family upon which the premium was just past due. The premises of Alvau are 20 miles from Seattle, and the character of the premises is a regular farm with a garden, a cow and chickens, and partly for provision and partly for hay for the cow. The buildings were a two-story house with basement. There are four rooms downstairs, kitchen, living-room dining-room and bedroom, and two bedrooms upstairs. Frank Alvau lived there with his wife and children.

Q. The walls, the foundation walls, were there any of the walls, foundation or otherwise, protruding out beyond the structure or foundation upon which the sills of a house itself rested? A. No, sir.

Q. Was there any lean-to?

(Testimony of Humbert Rossi.)

A. No lean at all of any kind.

Q. Or porch?

A. There was only a front porch, but no back porch.

I arrived there about eight o'clock or so in the evening, having taken a public bus. After I stayed pretty late talking insurance, Frank invited me to stay all night. It was a hard case to try to sell him. I stayed all night. I went to bed and in the [119] middle of the night heard the dogs barking. It was ten minutes or a quarter to three in the morning. It was dark and rainy. I asked Frank what was the matter and he said, "I am afraid they are burglars." We jumped out of bed and Frank said, "See what is wrong." I ran for my clothes in the closet. There was a hanger there and some hook, was the reason it fell to the floor, and I could not find my clothes. Frank threw me a pair of overalls and I put them on. I noticed a clock tipped over on its side and saw that it was about a quarter or ten minutes to three at that time. Then the lights went out. I went downstairs, with no socks, pair of shoes and overalls, and underwear that I slept in. We went to the window and we saw two or three men prowling around, and Frank said, "Look out, they are burglars." I could not distinguish whether they were men or women, but there was kind of a shadow. Frank said, "Hide, hide!" I asked him where I was going to hide, and he grabbed me by the hand and took me to the basement. He said, "Here is a place for you." We went to the wall and I heard

(Testimony of Humbert Rossi.)

him scratch something. He said, "Here is a place." I said, "No, I can't see nothing." He said, Lower yourself down," and put me there against the wall. He told me to stay there. It was dark. I moved around and felt an electric bulb, and tried to turn it on, but there was no electricity. I did not get out of there until Agent Kinnaird opened the door. I had been in the place about five hours. There were no walls of the dwelling-house that protruded outside the main structure upon which the dwelling-house rested. There was no lean-to or kitchen back porch. The place in which I was locked, was just underneath the kitchen and the bathroom. I worked for the Metropolitan Life Insurance Company after my arrest, for about a week or over, when I resigned because my name was in the papers in connection with this business. I have since been working in a grocery store. (Tr., pp. 56–63.) [120]

On cross-examination, the witness further testified as follows:

I slept upstairs. Mr. Alvau was in another room upstairs and Mrs. Alvau slept downstairs. One of the children slept upstairs and the other down. I did not turn on the lights for the agent. He had a flashlight. I did not know anything about the still or mash. My clothes didn't smell of mash or whiskey. (Tr., pp. 64–66.)

(Testimony of Mrs. Mary Alvau.)

On redirect examination, the witness further testified as follows:

I examined the basement door of the house. The sill of the door was broken by force. (Tr., p. 66.)

TESTIMONY OF MRS. MARY ALVAU, FOR DEFENDANTS.

Thereupon Mrs. MARY ALVAU was called as a witness for the defendants, and after being duly sworn, testified:

I am the wife of the defendant, Frank Alvau. I live close to Redondo Beach, and have lived there about three years. The premises are a ranch, with a six-room dwelling-house. On the day in question I heard the dogs barking and somebody sneaking on the porch. The little girl looked out the window and said it was a lady. It was dark. Shortly after a man came in my room and said, "Pardon me, I have made a mistake." He then went upstairs. I heard my husband say, "Who is it?" I did not hear what the other man answered. I could not get up right away, and there were too many men around, and I had to stay in bed. I got up as soon as I could. I lived in the premises with my husband and two children. No part of the walls of the house or foundation protrude out beyond the house except the side wall. The kitchen and the bathroom are on the foundation. There is no lean-to or porch in the back or rear of the premises [121] next to the kitchen. There are no foundation walls

(Testimony of Mrs. Mary Alvau.)

beyond the main foundation of the house, upon which the house does not rest. The defendant Rossi came there to fix my life insurance and my husband's insurance, because it was a long time behind. He came there in the evening and stayed all night. (Tr., pp. 66–70.)

On cross-examination the witness further testified as follows:

Q. Did anybody else live there besides you and your children? A. No.

Q. You knew the still was down there, didn't you?

Mr. CHAVELLE.—I object to that as immaterial. It is not cross-examination.

The COURT.—She may answer. Overruled.

Q. You knew the still was down there, didn't you?

Mr. CHAVELLE.—Exception, your Honor.

Mr. DeWOLFE.—What is that?

Mr. CHAVELLE.—Allow me an exception.

The COURT.—Yes.

Q. Your husband ran it?

A. I don't catch you, what you mean.

Q. You knew there was a still down there?

A. I don't know nothing about it.

Q. You didn't? A. No.

Q. Anyone tell the officers at the time of the arrest, that there was a still there but that they would not find it? A. No.

Q. Didn't you know your husband went down there and ran the still? A. What? [122]

(Testimony of Mrs. Mary Alvau.)

Q. Didn't you know that your husband went down in the basement and ran the still?

Mr. CHAVELLE.—Objected to for the same reason.

A. I don't know.

The COURT.—Overruled.

Mr. CHAVELLE.—Exception.

Q. (Mr. DeWOLFE.) You didn't see any still paraphernalia or manufacturing articles down there at all, never have been?

A. After the federals came there I heard about lots of things and see this in there and that was—well, that is all.

Q. Who does that still belong to? It belongs to your husband, doesn't it?

Mr. CHAVELLE.—Objected to as leading and suggestive and not proper cross-examination.

The COURT.—Overruled.

A. I don't know.

Q. You don't know the still belongs to him?

A. May belong to him and may not.

Mr. CHAVELLE.—Same objection.

The COURT.—I think you have pursued that far enough.

Mr. CHAVELLE.—Note an exception. (Tr., pp. 71, 72.)

Mr. CHAVELLE.—Will your Honor permit me to call a child to testify to the character of the premises?

The COURT.—You have evidence on that line now. If you had prepared your case, instead of

(Testimony of W. H. Kinnaird.)

reading transcript and asking a lot of other desultory questions, we would have gotten along better.

Mr. CHAVELLE.—Note an exception to the remarks of the Court.

The COURT.—Note an exception. (Tr., pp. 72, 73.)

Thereupon the defendants rested. [123]

The record shows that the case was not commenced until after 3:30 P. M. o'clock on the 3d day of December, 1928, and all of the evidence was in, both sides had finished their arguments to the jury and the case was ready for the instructions by the Court, at three minutes after five o'clock on the same day, and that the transcript of record shows that 80 pages of testimony were taken.

TESTIMONY OF W. H. KINNAIRD, FOR PLAINTIFF (RECALLED IN REBUTTAL).

Thereupon W. H. KINNAIRD was recalled in rebuttal by the plaintiff, and testified as follows:

Q. I will ask you if on July 12th, when you went on the premises of the defendant Alvau and went into the still-room, if you didn't ask the defendant Rossi to turn on the lights and if he didn't turn them on? A. He did.

Q. I ask you if at that time you didn't smell mash on the defendant Rossi's clothes. (Tr., p. 74.)

A. Yes.

TESTIMONY OF H. E. CARR, FOR PLAINTIFF (RECALLED IN REBUTTAL).

Thereupon H. E. CARR was recalled by the plaintiff, and testified as follows:

At the time of the arrest of the defendant Rossi, his clothing smelled of mash. He did not tell me at the time he was arrested that he was running the still. He did not tell any of the other agents in my presence, at the time he was arrested, that he was running the still. He said he came the night before to work for Alvau. When he got there, he found there was no ranch work, but the still was there, and he went to work at the still.

Q. I will ask you whether or not you didn't confer with Mrs. Alvau and have conversation with her to the effect that she said— [124]

The COURT.—Never mind; it is leading.

Mr. DeWOLFE.—I thought it was proper on rebuttal, your Honor.

Q. What conversation did you have with Mrs. Alvau with reference to whether or not there was a still there?

Mr. CHAVELLE.—He has already been asked the same question on direct.

The COURT.—Overruled.

Mr. CHAVELLE.—Exception.

A. She said there was a still there, but we would not find it. (Tr., pp. 75, 76.)

On cross-examination, the witness further testified as follows:

(Testimony of H. E. Carr.)

The defendant Rossi never told me at any time that he worked on the still. I stated on direct examination that Mrs. Mary Alvau, the wife of the defendant, had made no statement to me whatever.

Q. And when you were asked regarding Mrs. Mary Alvau, the wife of the defendant, didn't you state on direct, that she made no statement whatsoever?

A. If you will remember that—

Q. I ask you if you didn't so state on direct?

A. I did.

Q. How?

A. I stated she made no statement; that I stated in the main—

Q. That was said, that she made no statement, on direct? A. Yes, I did. (Tr., pp. 76, 77,)

Mr. CHAVELLE.—That is all. We renew our motion for directed verdict.

The COURT.—Denied.

Mr. CHAVELLE.—We renew our motion to suppress the evidence.

The COURT.—Motion denied. [125]

Mr. CHAVELLE.—And renew my motion to strike the testimony.

The COURT.—Motion denied.

Mr. CHAVELLE.—And in each case I ask the Court to allow an exception.

(Exceptions noted.) (Tr., p. 78.)

TESTIMONY OF J. CHARLES STANLEY, FOR DEFENDANTS (RECALLED).

Thereupon J. CHARLES STANLEY was recalled by the defendants, and testified as follows:

Q. Examining Defendants' Exhibit 11, which is the ground floor of the premises, I will ask you whether or not off the kitchen there shows a lean-to or porch? A. No, none.

Q. What are those marks there?

A. A couple of steps.

Q. Does that lead directly into the kitchen?

(Tr., p. 79.)

A. It does.

On cross-examination, the witness further testified as follows:

Q. When did you make your examination of those premises? A. About ten days or two weeks ago.

Q. You were never out there before ten days or two weeks ago, were you?

A. No, sir. (Tr., p. 79.)

Mr. CHAVELLE.—We have filed—I don't know your Honor's mode of procedure exactly—we have filed affidavits here in support of our petition to suppress. Are those affidavits a part of our record?

The COURT.—They are not. The Court has heard the whole matter together.

Mr. CHAVELLE.—May I offer the affidavits? [126]

The COURT.—You may.

Mr. CHAVELLE.—We will at this time offer the affidavits, then, that are filed in this cause and attached to the petition to suppress, namely, the affidavits of Annetta Alvau, Frank Alvau, Mary Alvau—

The COURT.—Any objection?

Mr. DeWOLFE.—No objection.

Mr. CHAVELLE.—(Continuing.) Fred Campbell and Stanley.

The COURT.—Very well, they will be considered as in, if the other side does not object.

Petition to suppress evidence was marked Defendants' Exhibit 15.

Affidavit of Frank Alvau was marked Defendants' Exhibit 16.

Affidavit of Humbert Rossi was marked Defendants' Exhibit 17.

The affidavit of Fred C. Campbell was marked Defendants' Exhibit 18.

The affidavit of Mary Alvau was marked Defendants' Exhibit 19.

The affidavit of Gino Alvau was marked Defendants' Exhibit 20.

The affidavit of Annetta Alvau was marked Defendants' Exhibit 21.

The affidavit of J. Charles Stanley was marked Defendant's Exhibit 22.

Mr. CHAVELLE.—And the Commissioner's testimony attached to the petition to suppress.

Mr. DeWOLFE.—I object to that as not proper.

The COURT.—Sustained. (Tr., pp. 79, 80.)
[127]

After counsel for the plaintiff and for the defendants had argued the case to the jury, the Court instructed the jury as follows:

INSTRUCTIONS OF COURT TO THE JURY.

Having heard the evidence and the arguments, it is now the duty of the Court to deliver to you the charge, preliminary to your retirement to consider the verdict.

You will remember that you accept the law from the Court. The facts, what witnesses to believe, the inferences to draw from the circumstances, is entirely your function.

The indictment in this case charges that the defendants, in July of this year, in this county, unlawfully made mash in a building other than a distillery duly authorized according to the law. The statutes of the United States, the old revenue statutes, which have been on the books since the Government was founded, for the purpose of controlling and regulating the production of intoxicating liquors and collecting revenue—for they have always been very properly taxed—collecting revenue for the operation of the Government, provide that distilleries shall only be established under the supervision and authorization of the Commissioner of Internal Revenue, and that only where he has authorized the distillery shall mash be fermented for the production of intoxicating liquors; and any-

one who produces them elsewhere, or makes mash elsewhere, is subject to a penalty, if found guilty of the act.

The second count is that the defendants unlawfully established a still in a place contrary to law. The statute also provides that a still for the purpose of manufacturing intoxicating liquor shall not be set up anywhere but in an authorized distillery and never in a dwelling, and anyone who violates that law and is found guilty is punished accordingly.

And the third count is that the defendants unlawfully [128] carried on the business of a distillery without having given the bond required by law. In order that only responsible persons likely to be law-abiding will be permitted to distill intoxicating liquor, the law requires they shall give a bond to the United States, approved by the Commissioner of Internal Revenue, and anyone who distills liquors without giving that bond commits a crime for which, if found guilty, he shall be punished accordingly.

You have, however, nothing to do with the punishment in any case. The verdict you render is not according to the consequences to the defendants, it is not according to the punishment, but such verdict is according to the law and the evidence in the case.

The defendants have plead not guilty to these charges, and that raises in their behalf a presumption of innocence, which requires you to acquit them unless upon the evidence you find the presumption overcome and to a degree that leaves your judgment persuaded that they are guilty as charged beyond a reasonable doubt. You might find one of

them guilty and the other not guilty, or both guilty or both not guilty, dependent upon your judgment of the evidence in the case.

It is clear that all these crimes charged have been committed and the only question is who has had part and parcel in the commission of them. The Government is required to prove the guilt of the defendants—not beyond all doubt, because there is nothing susceptible of proof beyond all doubt, so the law says that the proof shall go simply beyond a reasonable doubt.

What is a reasonable doubt? Those words are about as clear as any others, but yet if we may attempt to clarify them, the Court will say that after you have considered all the evidence and the circumstances in the case, if you have not a persistent [129] judgment that to a very high degree of probability the defendants are guilty as charged, you have a reasonable doubt, and will acquit them. On the other hand, after that review, if you have a persistent judgment that to a very high degree of probability the defendants, or either of them, are guilty as charged, you have no reasonable doubt and you are bound to convict them or just the one as to whom you have no reasonable doubt. The judgment and the probability must not rest at all upon mere suspicion, upon conjecture, but must find a basis and a foundation in the facts and circumstances proven in the case before you. When I say that in certain contingencies you are bound to acquit or bound to convict, remember there is no compulsion on you but your oath of office—you are

officers of this court—your duty, your honor and your conscience, which, of course, is enough to bind any juror to a conscientious discharge of his duty.

The defendants, of course, are not required to prove their innocence, no matter whether they are innocent or not; that is not the question you put to yourselves. The question is: Are they proven guilty beyond a reasonable doubt? You may not believe that the defendants are innocent, yet it will be your duty to acquit them unless at the same time from the evidence you believe them proven guilty beyond a reasonable doubt. So, too, as I said before, you may have doubts of the defendants' guilt, still it would be your duty to convict them unless your judgment approves the doubt as a reasonable one.

If a case is strong against a defendant, he need not prove his innocence, and yet it may stand him well in hand to go as far in that direction as he can; but whether he proves his innocence or not, if at the conclusion of the case his version of it leaves in your mind a reasonable doubt of guilt, he must be acquitted. [130]

The credibility of the witnesses is for you. That applies as well to the defendants, when they testify, as to any other witness. You see them, you observe their demeanor, take note of the reasonableness or of the unreasonableness of their statements to you. Are they attempting simply to deceive you by unreasonable statements? Are they counting upon a lack of intelligence in the jury-box to persuade you to believe any sort of a puerile and silly story?

Remember, you are not obliged to believe a thing is so simply because some witness swears it is so. A witness can swear to anything, but whether it is to be believed or not is a matter for your judgment. As my predecessor in Montana, Judge Knowles, used to say, you are not obliged to believe anything solely because it is sworn to. A witness may take the witness-stand and swear strongly that down the street he saw an elephant climb a telegraph pole, but you are not obliged to believe it, even if he takes you down and shows you the pole. I tell you, Gentlemen of the Jury, I have heard them just about swear to that in court, and so have you. Your judgment will determine where to place credibility and not allow yourselves to be deceived or to be deluded by statements that have no basis other than in the heart of the man who has no consideration for his oath on the witness-stand. There is a maxim of the law that a witness false in one particular should be distrusted in others, and if your judgment approves you can reject all his testimony.

As to the evidence in this case, as the Court has stated to you it is its duty to pass upon the competency and admissibility of the evidence, and when it has done so and allows it to go in evidence, all questions in respect to that are *in foreclosed the case* and you accept the evidence and consider it. The officers go out to [131] this place occupied by the defendant Alvau and his family, a little farm, house and barn, as they had a right to do. They had a right to do it for several reasons: First, that it is a violation of the revenue laws, and these same reve-

nue laws provide that the officers of the Government have a right to enter a distillery at any time and discover who is operating it, gauge the liquors, and to assess and collect the taxes, and to destroy contraband utensils and production. So they enter properly, as the Court says, they find Alvau upstairs; after a long search they discover this distillery. You can see the length to which the lawbreaker goes to foil the efforts of the Government to maintain the laws and to punish the criminal. It took them several hours to find the secret opening into this distillery in the basement. And when they get in there, what do they find? They find Rossi in there, and they find the still. The still had been operating. It was operating when they went there—they smelled its operation. They find a still five feet in diameter; they find a thousand gallons of mash, a full-fledged distillery, Gentlemen of the Jury, and the three officers, Carr, Griffith and Kinnaird, all told you that Rossi told them he came there the day before to work awhile with and for Alvau.

Now, Rossi takes the stand and tells you that he just was out there on some business of renewing insurance policies, and, hearing a clamor outside, Alvau hid him in there to hide him from prospective burglars, although the children and wife were allowed to take their chances with the desperate burglars that were expected to be outside; and he says he was not working there at all, did not know anything about the still; that it happened that he got up and simply put on Alvau's overalls instead of

his own clothes because his had fallen down; that is his statement [132] of how he came to be in this guilty situation which the officers have described. He denies that he told them he was working there also. Which do you prefer to believe, the three officers of the United States, the police, the sheriff of the United States, the same as the police and sheriff of the states, with a duty to discharge and discharging it under great difficulties always, as you well know, or will you believe the man who is charged with serious offenses, the consequence of which will be serious to him, at the lightest, if convicted? And ask yourselves whether his self-interest, which is the strongest motive that moves any man to act, has inspired him to state to you this account of his situation there in order to persuade you to believe it, or hoping that there is a fellow feeling in the breast of some juror which would inspire him to accept it, or at least to entertain a reasonable doubt, so as to secure an acquittal and go free of these offenses, if he committed them. It is not necessary that he should have owned the still or the premises. He who aids another to violate the law is himself as guilty as the principal actor. One who gets another to commit a crime for him, and it is committed, is as guilty of the act as he who did commit it. If one man employs another to work on a still which is running in violation of the law, the man employed is as guilty as the employer.

So that is the situation and the case for you,

Gentlemen of the Jury. The Court need not go over the evidence any further.

In so far as Alvau is concerned, I understood from counsel's argument that there is really no denial that he is involved; it is simply a question of law to be tried out in the appellate tribunal. He did not testify in his own behalf. The law is, when he does not, from that mere fact alone you will draw no inference [133] against him. But there is the situation of this place. I need not comment on the testimony of the wife that she did not know it was there. It is wholly immaterial whether she knew it or not, but the question whether that is one of the stories like that of the elephant climbing a pole is a matter you may consider. So that the case does not depend at all upon that part of her testimony. She did testify—and you will take her other testimony in consideration in determining her credibility—she did testify that Rossi had simply come there on account of the insurance. What else he came for, if she did not know there was a still there, she probably would not know.

Gentlemen of the Jury, that is the case for you. The Court concludes as it began—the defendants are presumed innocent, and the law requires an acquittal unless from the evidence you believe them guilty beyond a reasonable doubt; then you will convict them.

When you go to the jury-room, you will select one of your number foreman. It takes twelve to agree upon a verdict. (Tr., pp. 81–89.)

Mr. CHAVELLE.—I note an exception to the in-

struction that the agent had a right to go into the basement—"as they had a right to do."

And further, allow me an exception to the defendants, and each of them, to the instruction that agents have a right at any time to go into a dwelling-house to search for a distillery. Isn't that one of the instructions?

The COURT.—Under the circumstances, where there was a distillery the agents of the Government had a right to enter, as the statute declares. [134]

Mr. CHAVELLE.—And the Court referred to the fact that there was a guilty situation here which Rossi found himself in—in which the officers found him.

The COURT.—Exception noted.

Mr. CHAVELLE.—And further, to the Court's comment upon the evidence, as being in favor of the Government and against the defendants.

Exceptions will be noted?

The COURT.—When you take them, they are taken. The Court neither allows nor disallows exceptions. (Tr., p. 89.)

Thereupon the jury retired to deliberate on their verdict.

The plaintiffs in error, Frank Alvau and Humbert Rossi, pray that this their bill of exceptions may be allowed, settled and assigned.

EDWARD H. CHAVELLE,
JOHN B. WRIGHT,
By EDWARD H. CHAVELLE,
Attorneys for Plaintiffs in Error.

315 Lyon Building, Seattle, Washington. [135]

[Title of Court and Cause.]

ORDER SETTLING AMENDED BILL OF EXCEPTIONS.

The above cause coming on for hearing on this day, on the application of the defendants to settle their amended bill of exceptions, heretofore duly lodged in this cause; counsel for all parties appearing; and it appearing to the Court that the time within which to serve and file their bill of exceptions in the foregoing cause has been duly extended, and that said amended bill of exceptions as heretofore lodged with the Clerk is duly and seasonably presented for settlement and allowance; and it further appearing that said bill of exceptions contains all the material facts occurring upon the trial of the cause, together with the exceptions thereto, and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said amended bill of exceptions by reference and incorporation; and the Court being fully advised, it is by the Court

ORDERED, that said amended bill of exceptions be and the same hereby is settled as a true bill of exceptions in said cause, which contains all of the material facts, matters, things and exceptions thereto occurring upon the trial of said cause, and the same is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, as a true, full and correct bill of exceptions; and the Clerk of the court is

hereby [136] ordered to file the same as a record in said cause, and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit.

Settled in Butte. There is no evidence is in time. If is, the orders will be included.

Jan. 26, 1929.

BOURQUIN,
United States District Judge.

Received a copy of the within amended bill of exceptions this 9 day of Jan., 1929.

ANTHONY SAVAGE,
Attorney for Pltf.

[Endorsed]: Lodged Jan. 9, 1929.

[Endorsed]: Filed Jan. 28, 1929. [137]

[Title of Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS.

It appearing to the Court that defendants request that Defendants' Exhibits 10 and 11 be transmitted with the Record on Appeal to the Circuit Court of Appeals for the Ninth Circuit, it is

ORDERED, ADJUDGED and DECREED that the original exhibits marked Defendants' Exhibit 10 and 11 be and the same are hereby ordered to be transmitted with the Transcript on Appeal herein to the Circuit Court of Appeals at San Francisco, California, to be considered as part of the appellate record herein.

Dated, Seattle, Feb. 11, 1929.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed Feb. 11, 1929.

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please prepare copies of the following documents and papers in the above cause, and forward them under your certificate and seal to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, as a transcript of record in said cause, viz.:

1. Indictment.
2. Arraignment.
3. Petition to suppress evidence with transcript of Commissioner's hearing attached.
4. Plea of not guilty.
5. Record of day's trial and journal entry of order empanelling jury.
6. Verdict of guilty.
7. Opinion of Judge.
8. Affidavit of Fred C. Campbell.
9. Affidavit of Gino Alvau.
10. Affidavit of Annetta Alvau.
11. Affidavit of Mary Alvau.
12. Affidavit of Frank Alvau.
13. Affidavit of Humbert Rossi.

14. Affidavit of J. Charles Stanley. [138]
15. Motion in arrest of judgment.
16. Motion for new trial.
17. Order denying motion for new trial and in arrest of judgment.
18. Sentence and judgment of court.
19. Notice of appeal.
20. Order allowing appeal.
21. Citation on appeal.
22. Petition for appeal.
23. Bonds on appeal.
24. Stipulation for extending time for lodging bill of exceptions, extending term of court and for lodging record.
25. Order extending time for lodging bill of exceptions, extending term of court, and for lodging record.
26. Assignments of error.
27. Bill of exceptions.
28. Order settling and allowing bill of exceptions.
29. Praecipe for appellate record.
30. Clerk's certificate.

EDWARD H. CHAVELLE,
JOHN B. WRIGHT,
Attorneys for Defendants.

[Endorsed]: Filed Dec. 13, 1928. [139]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from to to 139, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true, and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fees (Act Feb. 11, 1925) for making record, certificate or return, 324 folios at 15¢ $49.60

Certificate of Clerk to Transcript of Record with seal ..... .50

Certificate of Clerk to Original Exhibits, with seal ..... .50

Total.....$49.60

I hereby certify that the above cost for preparing and certifying record, amounting to $49.60, has been paid to me by the attorney for the appellant.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 8th day of February, 1929.

[Seal] ED. M. LAKIN,

Clerk U. S. District Court, Western District of Washington.

By S. M. H. Cook,
Deputy. [140]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to ANTHONY SAVAGE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and

appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, in the State of California, within thirty days from date hereof, pursuant to notice of appeal and order thereon, filed in the office of the Clerk of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said Frank Alvau and Humbert Rossi are plaintiffs in error, and the United States of America is defendant in error, to show cause, if any there be, why judgment should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 13th day of December, 1928.

[Seal] BOURQUIN,
Judge.

Received a copy of the within Citation on Appeal this 12th day of Dec. 1928.

ANTHONY SAVAGE,
Attorney for ————.

[Endorsed]: Filed Dec. 13, 1928. [141]

[Endorsed]: No. 5746. United States Circuit Court of Appeals for the Ninth Circuit. Frank Alvau and Humbert Rossi, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 4, 1929.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

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In the United States
Circuit Court of Appeals
For the Ninth Circuit.

FRANK ALVAU, et al,
Plaintiffs in Error,
—vs.—
THE UNITED STATES OF AMERICA,
Defendants in Error.
No. 5746

Upon Appeal from the United States District Court for the Western District of Washington Northern Division

HONORABLE GEORGE M. BOURQUIN, *Judge*

BRIEF OF FRANK ALVAU AND HUMBERT ROSSI
Plaintiffs in Error

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STATEMENT OF THE CASE

An indictment was returned in this case, charging the plaintiffs in error, Frank Alvau and Humbert Rossi, in three counts with the violation of sections 3266, 3281 and 3282 of the revised statutes of the United States.

The first count in substance alleges that they did feloniously make and ferment approximately one-thousand gallons of mash in a certain building to-wit: the residence of Frank Alvau, the second count alleging that they did feloniously use a

certain still for the purpose of distilling spirits in a certain dwelling house, to-wit: the dwelling house of the said Frank Alvau; and the third count alleging that they did feloniously carry on the business of a distillery of spirits at certain premises known as the Frank Alvau premises, without having given bond as required by law. (Tr. p. 27 to 35.)

The appellant, Frank Alvau, by a timely petition moved to suppress the evidence in the hearing before the United States Commissioner, for the reason and upon the ground that it was admitted by the prosecution that the search and seizure was made in a dwelling house of which the defendant Frank Alvau was the owner, and that the said search and seizure of said dwelling house was made without a search warrant. (Tr. p. 25.)

That after the hearing before the said United States Commissioner, by a timely petition the appellant, Frank Alvau, petitioned the court to suppress the things and articles seized at his residence and home of himself and his family, that was unlawfully searched without a search warrant, for the reasons set forth in the said petition to suppress, (Tr. p. 5 to 9), and the affidavit in support of said petition (Tr. p. 9 to 11). That after the case was presented, upon said petition to suppress, to the Honorable Edward E. Cushman, the matter was referred by the said Judge to the Honorable George M. Bourquin, and the said petition to suppress came on regularly on the

motion calendar of the said court, but the court refused to pass upon said petition until the time of trial, for the reasons stated in the Court's memorandum of opinion denying the motion for a new trial. (Tr. p. 40 to 43.)

The defendant by timely motion prior to the trial again moved to suppress the evidence, and the Court refused to hear said petition, to which an exception was noted by defendant's counsel and allowed by the Court. Thereafter, after the government had rested at the conclusion of the government's testimony, the said petition to suppress was renewed, and other motions made to which exceptions were allowed by the Court. (Tr. p. 36-37.)

The defendant Alvau did not take the stand in his own behalf. The jury returned a verdict of "guilty" on all counts against both defendants, and the Court sentenced them for a period of eight months in Jefferson County jail, and to pay a fine of $1,000, on all counts of the indictment. (Tr. p. 67-70.)

In support of said petition to suppress, prior to the time the same came on for hearing, there were filed the affidavits, besides the affidavit of the said appellant Frank Alvau, of Fred C. Campbell, Gino Alvau, Annetta Alvau, Mary Alvau, Frank Alvau, Humbert Rossi and J. Charles Stanley.

At the proper and appropriate time the defendants, Frank Alvau and Humbert Rossi did move

the court to strike all the testimony offered in behalf of the government and for a directed verdict, and made a motion in arrest of judgment and a motion for a new trial, all of which petitions and motions were denied by the Court, and each and all of the said rulings by the Court were excepted to by the appellant. (Tr. p. 36-37.)

ASSIGNMENTS OF ERROR

I.

That the Court erred in denying the defendants' petition to suppress the evidence, which motions were separately and severally made for each of said defendants before the case was called for trial, and which motions were renewed and denied after the government had rested its case, and which motions were renewed and again denied before the defense rested its case, and at the end of the entire case before the Court instructed the jury; for the reason that the dwelling house of the defendant was entered and searched, and the seizure made of the articles, without a search warrant, in violation of the constitutional rights of the said defendants, and that said search and seizure were illegal and unlawful.

II.

That the Court erred in denying the defendants' motion to strike the testimony, which motions were separately and severally made for each of said

defendants, after the government had rested its case on direct, and again at the end of the entire case, for the reason and upon the ground that the said evidence was incompetent, irrelevant and immaterial, and based upon an illegal and unlawful search and seizure of the property of the defendants, and an invasion of the constitutional rights of the said defendants, in that their dwelling house was searched in the night time, without a search warrant therefor, and that the evidence was illegally and unlawfully seized by reason of said unlawful search, and that all of the testimony was procured by reason of said unlawful and illegal search and seizure.

III.

In denying the defendants' motions for a directed verdict, which motions were separately and severally made for each of said defendants at the close of the Government's case, and again at the close of the entire case, for the reason and upon the ground that sufficient evidence had not been produced to constitute a crime, and that there was no evidence except that procured by the unlawful search and seizure without a search-warrant, of a dwelling house, and property had been seized in violation of the constitutional rights of the said defendants.

IV.

In denying the motion for a directed verdict made at the close of the government's case, and

again at the end of the entire case for the defendant Humbert Rossi, for the reason and upon the ground that the said Humbert Rossi was not required to file the bond or pay the tax as charged in Counts 2 and 3 of said indictment, for the reason that all of the evidence only tended to show that said Rossi was an aider and abettor and the principal only could be liable for the said tax and the said bond as charged in said counts.

V.

In admitting the exhibits of the Government, consisting of parts of a still and also two specimens of intoxicating liquor, for the reason and upon the ground that the same were illegally and unlawfully seized in a search of a dwelling-house in the night time, in violation of the constitutional rights of the said defendants.

VI.

The Court erred in instructing the jury as follows:

> "As to the evidence in this case, as the Court has stated to you it is its duty to pass upon the competency and admissibility of the evidence, and when it has done so and allows it to go in evidence, all question in respect to that are in the case and you accept the evidence and consider it. The officers go out to this place occupied by the defendant Alvau and his family, a little farm, house and barn, as they had

a right to do. They had a right to do it for several reasons: First, that it is a violation of the revenue laws, and these same revenue laws provide that the officers of the Government have a right to enter a distillery at any time and discover who is operating it, gauge the liquors, and to assess and collect the taxes, and to destroy contraband utensils and production. So they entered properly, as the Court says, they find Alvau upstairs; after a long search they discover this distillery. You can see the length to which the law-breaker goes to foil the efforts of the Government to maintain the laws and to punish the criminal. It took several hours to find the secret opening into this distillery, in the basement."

in that the Court instructed the jury to the effect that Government agents had a right to enter a dwelling house at any time, to search for a distillery, without a search warrant, to which the defendants and each of them separately excepted, as being contrary to law, and in this case in violation of the constitutional rights of said defendants.

VII.

The Court erred in instructing the jury as follows:

"The credibility of the witnesses is for you. That applies as well to the defendants, when they testify, as to any other witness. You see

them, you observe their demeanor, take note of the reasonableness or of the unreasonableness of their statements to you. Are they attempting simply to deceive you by unreasonable statements? Are they counting upon a lack of intelligence in the jury box to persuade you to believe any sort of a puerile and silly story? Remember, you are not obliged to believe a thing is so, simply because some witness swears it is so. A witness can swear to anything, but whether it is to be believed or not is a matter for your judgment. As my predecessor in Montana, Judge Knowles, used to say, you are not obliged to believe anything solely because it is sworn to. A witness may take the witness stand and swear strongly that down the street he saw an elephant climb a telegraph pole, but you are not obliged to believe it, even if he takes you down and shows you the pole. I tell you, Gentlemen, I have heard them just about swear to that in court, and so have you. Your judgment will determine where to place credibility and not allow yourselves to be deceived or to be deluded by the statements that have no basis other than in the heart of the man who has no thought of his oath on the witness stand. There is a maxim of the law that a witness false in one particular should be distrusted in others, and if your judgment

approves you can reject all his testimony.

"As to the evidence in this case, as the Court has stated to you it is its duty to pass upon the competency and admissibility of the evidence, and when it has done so and allows it to go in evidence, all questions in respect to that are in the case and you accept the evidence and consider it. The officers go out to this place occupied by the defendant Alvau and his family, a little farm, house and barn, as they had a right to do. They had a right to do it for several reasons: First, that it is a violation of the revenue laws, and these same revenue laws provide that the officers of the Government have a right to enter a distillery at any time and discover who is operating it, gauge the liquors, and to assess and collect the taxes, and to destroy contraband utensils and production. So they enter properly, as the Court says, they find Alvau upstairs; after a long search they discover this distillery. You can see the length to which the law-breaker goes to foil the efforts of the Government to maintain the laws and to punish the criminal. It took them several hours to find the secret opening into this distillery, in the basement. And when they get in there, what do they find? They find Rossi in there, and they find the still. The still had been operating. It was operating when they went there—they smelled

its operation. They find a still five feet in diameter; they find a thousand gallons of mash, a full-fledged distillery, Gentlemen of the Jury, and the three officers, Carr, Griffith and Kinnaird, all told you that Rossi told them he came there the day before to work a while with and for Alvau.

"Now, Rossi takes the stand and tells you that he just was out there on some business of renewing insurance policies, and, hearing a clamor outside, Alvau hid him there to hide him from prospective burglars, although the children and wife were allowed to take their chances with the desperate burglars that were expected to be outside; and he says he was not working there at all, did not know anything about this still; that it happened that he got up and simply put on Alvau's overalls instead of his own clothes because his had fallen down; that is his statement of how he came to be in this guilty situation which the officers have described. He denies that he told them he was working there, also. Which do you prefer to believe, the three officers of the United States, the police, the sheriff of the United States, the same as the police and sheriff of the states, with a duty to discharge and discharging it under great difficulties always, as you well know, or will you believe the man who is charged with serious offenses, the con-

sequences of which will be serious to him, at the lightest, if convicted? And ask yourselves whether his self-interest, which is the strongest motive that moves any man to act, has inspired him to state to you this account of his situation there in order to persuade you to believe it, or hoping that there is a fellow feeling in the breast of some juror which would inspire him to accept it, or at least to entertain a reasonable doubt, so as to secure an acquittal and go free of these offenses, if committed. It is not necessary that he should have owned the still or the premises. He who aids another to violate the law is himself as guilty as the principal actor. One who gets another to commit a crime for him, and it is committed, is as guilty of the act as he who did commit it. If one man employs another to work on a still which is running in violation of the law, the man employed is as guilty as the employer.

"So that is the situation and the case for you, Gentlemen of the Jury. The Court need not go over the evidence any further."

Because the Constitution of Washington, adopted by the Constitutional Convention, and ratified by a popular vote of the people before the admission of the State into the Union, expressly forbids a judge in instructing a jury, to comment on the evidence in the case in its instructions to the jury, the District Court erred in commenting on

the evidence in its instructions to the jury; and for the further reason that the instructions of the Court prevented the jury from functioning and doing its duty as sole and exclusive judges of the facts, thereby denying the defendants the right of trial by jury.

VIII.

The Court erred in admitting Government's exhibits, over the objection of the counsel for the defendants:

MR. DEWOLFE—We offer these in evidence—1 to 8. THE COURT—Admitted.

MR. CHEVELLE—We object to them offering these in evidence, and at this time renew our petition to suppress the evidence.

THE COURT—The objection will be overruled for the present. When the evidence is all in, if you have made out a case showing that the evidence was illegally gotten, the Court will rule on it then.

IX.

The Court erred in limiting the cross-examination of the witness, Kinnaird, as follows:

THE COURT—Vacate the stand. You are referring to a transcript.

MR. CHAVELLE—I was trying to refresh my recollection from transcript, your Honor. Note an exception.

THE COURT—Let it be vacated.

for the reason and upon the ground that the record shows said case was continued until three o'clock in the afternoon, 80 pages of testimony were taken, and the case summed up by both sides, by 5:10 o'clock p. m. on the same day, and that the defendants were precluded from having a fair trial by the restriction of the Court upon the cross examination of the witness Kinnaird.

X.

The Court erred in denying the defendants' motion to suppress the evidence, made at the end of the Government's case, as follows:

MR. CHAVELLE—We renew our motion to suppress the evidence.

THE COURT—It appears from the evidence of the officers, the agents of the prohibition office, that they went to this place to investigate. When they got within a distance of the house or premises they smelled fermenting mash. As they came closer to the buildings it got stronger, and as they got near the residence they smelled not only the mash but the odor of kerosene and the still in operation.

These officers were not alone prohibition agents, but they had the authority of revenue officers. The premises was a distillery. They found this still below, that had been recently operated, and they found the mash. That comes under the

revenue statute. The law is that revenue officers may enter a distillery at any time to discover who is operating it, gauge the liquor, and destroy anything that is illegally being carried on, which these officers did. They cannot camouflage a distillery like this one by having the entrance in a dwelling house so they cannot enter.

The Court rules that the evidence was legally secured and is competent. Therefore, the motion is denied.

MR. CHAVELLE—Exception. THE COURT—It will be noted.

MR. CHAVELLE—At this time, I move to strike all the testimony— THE COURT—Motion denied.

MR. CHAVELLE—(Continuing)—of each and every one of the Government's witnesses. THE COURT—Exception.

MR. CHAVELLE—I make a motion at this time for a directed verdict. THE COURT—Denied.

MR. CHAVELLE—Note an exception.

XI.

The Court erred in permitting the witness, Mrs. Mary Alvau, to testify over the objection of Frank Alvau, her husband:

MR. DEWOLFE—You knew the still was down there, didn't you?

MR. CHAVELLE—I object to that as immater-

ial. It is not cross examination. THE COURT—She may answer. Overruled.

Q. You knew the still was down there, didn't you?

MR. CHAVELLE—Exception, Your Honor.

MR. DEWOLFE—What is that? MR. CHAVELLE—Allow me an exception? THE COURT—Yes.

Q. Didn't you know your husband went down there and ran the still?

MR. CHAVELLE—Objected to for the same reason. A. I don't know. THE COURT—Overruled.

MR. CHAVELLE—Exception.

Q. You didn't see any still paraphernalia or manufacturing articles down there at all, never have been?

A. After the federals came there I heard about lots of things and see this in there and that was—well, that is all.

Q. Who does that still belong to? It belongs to your husband, doesn't it?

MR. CHAVELLE—Objected to as leading and suggestive and not proper cross examination. THE COURT—Overruled. A. I don't know.

Q. You don't know the still belongs to him? A. May belong to him and may not. MR. CHAVELLE—Same objection.

THE COURT—I think you have pursued that far enough.

MR. CHAVELLE—Note an exception.

as compelling the wife to testify against her husband, contrary to the laws and statutes of the State of Washington, and an invasion of the rights of the defendant Alvau.

XII.

The Court erred in refusing to admit testimony taken before the United States Commissioner, which was attached to the defendant's petition to suppress the evidence, and by reference made a part thereof:

MR. CHAVELLE — And the Commissioner's testimony attached to the petition to suppress.

MR. DEWOLFE—I object to that as not proper.

THE COURT—Sustained.

XIII.

The Court erred in denying the defendants' motion for a directed verdict, to suppress the evidence, and to strike the testimony, made at the close of the case, as follows:

MR. CHAVELLE—That is all. We renew our motion for a directed verdict. THE COURT—Denied.

MR. CHAVELLE—We renew our motion to suppress the evidence. THE COURT — Motion denied.

MR. CHAVELLE—And renew my motion to strike the testimony. THE COURT—Motion denied.

MR. CHAVELLE—And in each case I ask the Court to allow an exception. THE COURT—Exceptions allowed.

XIV.

For all the reasons set forth in the foregoing assignments of error, the Court erred in denying the defendants' motions in arrest of judgment.

XV.

For all the reasons set forth in the foregoing assignments of error, the Court erred in denying the defendants' motion for new trial.

XVI.

The Court erred in pronouncing judgment upon each of the said defendants.

WHEREFORE, plaintiffs in error severally pray that the judgment of said Court against him be reversed and this cause be remanded to said District Court with instructions to dismiss the same, and to discharge the plaintiff in error from custody, and exonerate the sureties on his bond, and for such other and further relief as to the Court may seem proper. (Tr. 73-85.)

ARGUMENT

Point 1

From the initiation of the proceedings, leading eventually to the trial of the case, it was apparent

that the trial court was not going to give the defendant a hearing upon the verified petition and affidavits that were before him, for the reason indicated in the opinion of the Judge that these matters are filched from the police court and are an invasion of state rights that ought to be tried in some other court than the federal court, or federal police courts to be subsequently created, and in the economy of time and procedure. (Tr. p. 40.) The petition and affidavits of the defendant Alvau were relegated to the confusion of a trial and remained to be decided after the case had been tried, although it appeared that the dwelling house and residence of the defendant Alvau and his family was searched in the night time without a search warrant. (Tr. p. 93-97.)

The matter of the motion to suppress the evidence had originally come on for hearing before the United States Commissioner, and the United States Attorney after stipulating in the record that there was no search warrant, and it appearing that the dwelling house of the appellant Alvau had been searched, the motion was denied. Subsequently said petition upon the affidavits, came on for hearing before the Honorable Judge Edward E. Cushman, and after hearing the argument for the government and for the petitioner Alvau and taking the mater under advisement, the Court referred said petition to suppress to the Honorable George M. Bourquin. That was on the 19th day

of November, 1928. Thereafter and on the 26th day of November, 1928, said motion to suppress was continued before the Honorable Judge Bourquin until the 3rd day of December, 1928, the appellant Alvau insisting upon his motion and the Court continuing it until after he had heard the trial of the case. On the 3rd day of December, 1928, the matter came on for hearing and the petition to suppress was renewed. The Court again stated he would not hear the petition until after he had heard the trial. Thereupon the record was made showing the motion to suppress was timely and the Court refused to hear it until the trial of the whole case. An exception was taken to the refusal of the Court to hear the petition to suppress before proceeding with the trial. (Tr. p. 93-97.)

The petition to suppress was directed to the things and articles seized in the residence and home of Frank Alvau and his family at Redondo, in King County, Washington, for the reason and upon the grounds:

1. That the petitioner on or about the 12th day of July, 1928, and also subsequent thereto resided with his family on a ranch of 14 acres, consisting of a private dwelling house which was his residence at the time of the unlawful search and seizure, and the private dwelling house of said petitioner was searched and an unlawful seizure made therefrom without a search warrant and without any

warrant whatsoever, or authority at law, under the following facts and circumstances:

The prohibition agents in the night time on the said 12th day of July, 1928, at about three o'clock in the morning, without any search warrant and without any warrant whatsoever, or authority of law, battered down the door of the private dwelling house of the petitioner and his family, breaking the door sill and the lock that securely fastened the same, and without due process of law or any legal authority whatsoever, unlawfully and wrongfully entered the private dwelling house of the said petitioner and his family, and proceeded to search the said dwelling house, stating to said petitioner that they were prohibition agents, and upon being requested for their authority and a search warrant, they stated that they did not need a search warant, but had a right to search without any warrant whatsoever.

Thereafter the said search continued for a period of nearly five hours, and during said period the said officers moved about the personal belongings of the said petitioner in the said premises, and unlawfully and illegally searched and seized certain articles belonging to the said petitioner, without any search warrant whatsoever, in violation of the constitutional rights of said petitioner under the Fourth and Fifth Amendments to the Constitution of the United States, and in violation of Article I, Sections 6 and 9 of the Constitution

of the State of Washington, guaranteeing a person against unlawful search and seizure in his home.

2. That no business of any kind was transacted or carried on in petitioner's said dwelling house by petitioner, and no intoxicating liquor was unlawfully sold therein, and the said dwelling house was used solely as a private dwelling by said petitioner and his family.

3. That there was no affidavit or complaint upon which a lawful and valid search warrant could issue, showing that intoxicating liquor containing more than one-half of one per cent by volume and fit for use for beverage purposes, was unlawfully sold in the said dwelling house; that there was no complaint or affidavit which set forth facts, upon which probable cause for belief that such intoxicating liquor was so possessed or could be found could be based.

4. That there was no complaint or affidavit whatsoever containing a statement of facts upon which the existence of probable cause for the issuance of a search warrant could be found.

5. That there was no complaint or affidavit describing the premises directed to be searched, or any search warrant whatsoever, and the said premises were not particularly and definitely described in any search warrant directed against said premises. There was no search warrant executed by a person to whom it could have been directed.

6. That without any warrant whatsoever a private dwelling house in which intoxicating liquor was not unlawfully sold was searched.

And the affidavit attached to the petition to suppress alleges that the said dwelling house consists of six rooms and basement, located on 14 acres of land belonging to Frank Alvau; that he had lived in the said premises with his family for a period of more than two years prior to the 12th day of July, 1928, and on said day and subsequent thereto and at the time of making his affidavit was still living in the premises. That on the 12th day of July, 1928, at about three o'clock in the morning, certain prohibition agents entered said premises of the said Frank Alvau, by battering down a door to the dwelling house, which was securely fastened and locked, and breaking the sill of said doorway and the said lock, and entered the said dwelling house and proceeded to search the same without any legal or lawful search warrant, and without any warrant whatsoever, and took from the premises certain articles belonging to the said defendant, in violation of the Constitutional rights of said defendant under the Fourth and Fifth Amendments to the Constitution of the United States, and in violation of the Constitution of the State of Washington, Article I, Sections 6 and 9. (Tr. 93-96.)

It further appears from the affidavit of Fred C. Campbell, in support of said petition to suppress

by the defendant Frank Alvau that he, the said Campbell, is a practicing lawyer in the said city and state; that he made a thorough examination of the premises at said residence of Frank Alvau located at Redondo Beach, King County, Washington, and that the said residence is an ordinary dwelling house located at a distance of about 1,000 feet or more from the county road; that there is a large garden where vegetables and crops are raised; also a chicken yard with chickens, and that a cow is kept on said premises for use of the family; that the building is well and substantially built, with a heavy cement foundation completely under said house, and that no portion of said foundation extends beyond said house, and that all of the said foundation is within the limits of said dwelling house and part of the same; that the lock on the inside of the basement door and the woodwork on said door had been broken off by some heavy force from the outside, and that there is an entrance from said basement to the kitchen of said residence by means of a stairway.

The affidavit of Gino Alvau states that on the 12th day of July, 1928, he was sleeping on the second floor of the said dwelling house in a bedroom alone. That he was awakened by the sound of footsteps on the stairs and that immediately thereafter a man came into the room, that the night was dark and he could not distinguish the man's face, but that conversation ensued which

was as follows: His father asked "Where are your papers?" The man said "I don't need any papers." That his father said "Where is your star?" That the man who was subsequently identified as a prohibition agent was the man that searched his room and his father's room. That later on he went out to the porch and called, "Hey, Charlie," and someone answered "all right," and then two other men came upstairs and again searched the dwelling house; and they went from the bedroom of said defendant, Frank Alvau, to the unfinished portion of the dwelling house known as the attic; that after making search of all the bedrooms and attic they went downstairs again.

Affidavit of Annetta Alvau states that she was awakened in the night time by noises; that she looked out of the window and saw in the darkness figures about the house; that thereafter she heard the crashing and breaking into of said dwelling house and thereupon some strange man entered her bedroom which is located on the first floor of the dwelling house; that the condition of the night was very dark.

The affidavit of Mary Alvau states that she lives with her husband, the defendant, Frank Alvau, and her children in a frame dwelling house which was the subject of the search and seizure. That the said dwelling house consists of four rooms upon the main or first floor, being the kitchen, dining room, living room and a downstairs bed-

room; that said rooms are plastered, completely furnished as a dwelling house and occupied by said defendant and his family; that there is also a cement basement, the entrance of which leads by stairway into the kitchen, and on the second floor there are two bedrooms occupied by the son of the affiant and her husband and defendant, together with the unfinished portion of the said dwelling house, used as an attic; that there is a porch on the front of the said house adjoining the down-stairs porch. That the said dwelling house is situated on a large tract of land about 1,000 feet from the entrance of the gate to said premises, sitting on a point considerably above the elevation of the road; that surrounding the house are flower gardens, a well, and a water cistern and beyond the said flower gardens are large vegetable gardens which are cultivated and crop bearing; that said vegetables raised from the land are used for the sustenance of the family and in the rear of said house are chicken yards, the produce and chicken eggs being used for the table of the family. That in the pasture adjoining the said house is a cow, kept by the said family for the milk that is used in making cheese for the market and for the use of the family. That the said dwelling house has been occupied by the said family for two years immediately prior to the 12th day of July, 1928; that said dwelling house was built by the said defendant, Frank Alvau and so occupied ever since

its completion as his home. That upon the 12th day of July, 1928, affiant was awakened in the night time about three a. m. by the barking of a dog; that thereupon affiant heard the breaking in of the basement door and the entry of a man into her room, who proceeded to search the room, then went upstairs where affiant's husband was. Thereafter the affiant got up from her bed, turned on the electric lights and made a fire in the kitchen range; thereafter she went to the rear of the premises to feed the chickens; that three or four men had been in the house searching the same, then went to the chicken yard and searched about, and the search continued. While the affiant proceeded with her house work and a complete search of the dwelling house was in progress, two of the men again went up stairs and affiant followed them to see what they were going to do, and the said search continued until about seven o'clock when all the men, except one, left; that between seven and eight o'clock affiant's husband was compelled to leave the premises and go to town and was away about four hours, and that said search continued for a period of six hours. That all of the premises are the original premises and that the part of the dwelling house in which they claimed was the sill is directly under the kitchen of the house; that the foundation and walls are continuous parts of the original foundation upon which the house was built and now rests, and that

there was no excavation outside of the limits of the house, but that all of said premises are strictly within the limits of the foundation of said house; that the entrance to the basement is an ordinary one to be found in any dwelling of this character, being a door leading from the basement to the outside, affording access to the premises from the outside or to the outside from the said inside of house and leading from the basement to the lower floor of said premises.

The said affidavit of the said Defendant, Frank Alvau, repeats the allegations of the affidavit of his wife, Mary Alvau, as to the breaking in of the house; and that it is a dwelling house and he is the owner thereof; and the extent of the continuous search and the arrival of the said agents at three o'clock in the morning; and the search of all parts of the said dwelling house including the bed rooms.

The affidavit of Humbert Rossi deposes and says that he was present at the premises of Frank Alvau; that said premises are used as a dwelling house for the purpose of Alvau and said family; that the foundation of the said dwelling house, and the only foundation of said dwelling house, is the one on which the house solely rests and that there are no outer walls or excavations adjoining said premises. He repeats the evidence of the breaking in and entry into the house in the night time and the evidence of the force of the same, by

the broken sill of the door, and the length of the period of the search, consuming some six hours.

The affidavit of J. Charles Stanley states that he is an architect duly licensed and practicing; a graduate of the School of Architecture of the University of Pennsylvania in 1906; that he has maintained an office in Seattle for many years and now maintains an office in the Republic Building in Seattle; that in 1907-1908 he was assistant designer for the architectural firm of Geo. B. Post & Sons, New York, who were the architects for the Olympic Hotel in Seattle, and while in their employ he worked on the City College of New York, Wisconsin State Capitol, Cleveland Trust Co. Building at Cleveland, and several other buildings. In 1909-11 had charge of office of Saunders & Lawton in Seattle and while in their employ designed the State Reformatory Building at Monroe, the Forestry Building at the Exposition on the University of Washington grounds, the Alhambra Theatre, the Crane Building and several other public buildings. In 1912-13 he was in the contracting and engineering business with A. W. Quist Construction Co. and built the Times Building. That in 1915-16 he designed the Ames Shipyard and several other shipyards on the Coast; in 1919-22 designed the Elks Club Building in Olympia and also in Centralia, Washington, and school buildings at Olympia. That since 1922 he has been in practice in Seattle and has designed

the Elks Club at Port Angeles and other buildings there, the Greenwood Block in Seattle and other stores and residences in Seattle. That he examined the premises of the said defendant, Frank Alvau, at Redondo Beach, King County, Washington, which comprise and consist of a dwelling house; that the building is a new frame structure, and there are no exterior walls upon the said premises upon which the building does not rest; that the dwelling house consists entirely of the single structure and the part of the premises in which it is alleged there was a still was in the confines of the said dwelling house and part of the foundation upon which the dwelling house rests; that immediately above said particular part of the premises in which was alleged there was a still, was a kitchen and a bathroom of the said dwelling house; that the cement walls of the basement are not of recent cement and construction, but are the original foundation walls of said structure; that the main part of the basement and foundation follows the outline of the house, and that no walls are built off to the side of the main structure, as it is all a main part of the house, and there are no foundations built off to one side of any structure that are not the walls of the main part of the house. That attached to his affidavit, specifically referred to and made a part of his affidavit, is a correct sketch made by him of the entire structure upon which the said dwelling house rests, containing

all of the premises in question. (Tr. 43-65.)

Upon the hearing of the trial of the case, all of these affidavits were offered in evidence and admitted, in support of the petition to suppress the evidence, of the defendant, Frank Alvau.

There is no attempt by the government to traverse the allegations in the petition and said affidavits; they admit that the premises are a dwelling house, and that there was no search warrant.

There has long since ceased to be any question that officers have no right to enter a private dwelling house without a search warrant, or without evidence that intoxicating liquor is being sold therein and although the trial Court, was reversed by the appellate court for this distict in several instances, upon the same question, he still considers this case contrary to the appellate court decision, and instead relies upon his former opinions which he applies and incorporates by reference in his opinion in the present case on page 42 of the transcript: "Much of the comment of the writer in Cala's Case, 17 Fed. (2) 829, reversed, 22 Fed. (2) 742, Herter's Case, 24 Fed. (2) 111, reversed, 27 Fed. (2) 521, applies to the instant cases and is incorporated by reference."

The question has been so repeatedly decided that a private dwelling house cannot be searched unless there is evidence of the unlawful sale of intoxicating liquor, that it would not seem to be necessary to argue the matter, if it were not for

the fact that the learned trial court, in spite of all the decisions, has decided the case contrary to them. "The search of a private dwelling without a search warrant is in itself unreasonable and abhorrent to our laws." Agnello vs. U. S., 269 U. S. 20. The Agnello case was a prosecution for violation of the Internal Revenue laws and a search for narcotics was made. The Supreme Court said:

> "Belief, however well founded, that an article sought is concealed in a private dwelling house, furnishes no justification for search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause" * * * "searches and seizures naturally and usually appertain to and attend such arrest,but the right does not extend to other places. Agnello's house was several blocks away from where the arrest was made. The search cannot be sustained as an incident to arrest."

This Honorable Court, in the case of Temperani vs. U. S. 299 Fed. pages 365-367, at page 367, uses the following language:

> "An attempt is made to justify the conduct of the officers under the common law or statutory rule permitting peace officers to make arrests for offenses committed within their presence. But here the offender was not in

the presence of the officers; he was not in the garage, and they had no reason to suspect he was there. Laying all pretenses aside, the officers entered the garage, not to apprehend an offender for committing an offense within their presence, but to make a search of the premises to obtain tangible evidence to go before a jury, and whatever necessity may exist for enforcing the National Prohibition Act or other laws, the violation of rights guaranteed by the Constitution cannot be tolerated or condoned. If the present laws are deficient in not permitting the search in a constitutional way of homes where intoxicating liquor is known to be manufactured, the remedy is with Congress, not in subterfuge or evasion. For these reasons the Court should have kept from the jury all property found on the search and all evidence given by the officers concerning the same."

And this case was subsequently followed and cited by the Supreme Court of the United States in Agnello vs. U. S. 269 U. S. 20. In Amos vs. U. S. 255 U. S. 313, two revenue men went to the home of the defendant in his absence, and finding his wife there told her that they were revenue officers and had come to search the premises for violation of the revenue laws. The wife, without demurrer, opened the store and the revenue men searched therein, and in defendant's living

quarters found whiskey. The search was completed before the defendant returned and the revenue men had no search warrant. The Supreme Court held that the search was illegal.

This was an internal revenue case and seems to answer the distinction the trial court attempts to raise between a prosecution of internal revenue laws and the National Prohibition Act.

In Weeks vs. U. S. 232 U. S. 383, Mr. Justice Day, speaking for the court, said:

> "The effect of the Fourth Amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the federal Constitution, should find no sanction in the

judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

In Gouled vs. U. S. 255 U. S. 298, Mr. Justice Clarke, speaking for the Court, said:

"The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if, for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights."

In the case of Bell vs. United States, 9 Fed. (2nd) 820, this Court sets forth the rule as follows:

"Belief, however well founded, is not justi-

fication for a search of that place without a warrant * * * ".

The Fifth Circuit Court of Appeals lays down the following rule in the case of Lindsay vs. United States, 12 Fed. (2nd) 771:

> "There is no sanction in the decision of the Court, federal or state, for the search of a private dwelling house without a warrant. Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant."

The Seventh Circuit, passing upon a similar question in Jozwich vs. United States, 288 Fed. 831, states the rule as follows:

> "The manufacture of illicit liquor in a house does not bring the case within the language of the Statute (quoting Section 25 of Title 2, National Prohibition Act). It is apparent from a reading of this section that Congress had in mind a distinction which has always existed (so far as search is concerned) between a dwelling house and a place of business. Since the time of Otis back in the Colonial days the dwelling house occupied as such has been recognized as the owner's "castle", and has not been the legitimate object of raids by Government officials unless the showing made before the Commissioner disclosed added facts

not necessary in case the alleged illegal transaction occurred in a place of business".

Judge Brewster, for the Eastern District of Massachusetts, in United States vs. Palma, 299 Fed. 149, at page 151, after referring to Section 25, N. P. A., states the following:

> "As I read the section, the dominant idea of those who framed it was to permit searches of private dwellings only where illegal traffic in liquor was disclosed or most likely to be found, and enumerating these places Congress excluded all others. If it had intended to include the business of a brewery or a distillery, it could have easily so provided. It cannot be seriously contended that Congress intended to permit the searching of private dwellings which were being used in part for any business purpose whatever.."

The Supreme Court of the United States, in recently passing upon the construction to be placed on Section 25, Title 2 of the National Prohibition Act, affirmed the decision of the Ninth Circuit Court of Appeals in the case of United States vs. Berkness, 72 L. Ed. 211, and Justice McReynolds, in writing the opinion, uses the following language at page 214:

> "Notwithstanding known difficulties attending enforcement of prohibition legislation, Congress was careful to declare in the National

> Prohibition Act that mere possession of liquor in one's home 'shall not be unlawful', and to forbid procurement of evidence through warrants directing search of dwellings strictly private not alleged to be used for unlawful sale. The definite intention to protect the home was further emphasized by the Act of 1921" * * * * "But the emphatic declaration that no private dwelling shall be searched except under specified circumstances discloses a general policy to protect the home against intrusion through the use of search warrants."

Judge Burns, for the Eastern District of Louisiana, in discussing the issue involved in this case, in United States vs. A Certain Distillery, 24 Fed. (2nd) 557, after referring to the opinion of the Supreme Court in the Berkness case, Supra, disposes of the issue in the following language:

> "I take this declaration to be decisive of this case, and conclude that the use of so-called smell warrants should no longer be countenanced. On the face of the affidavit in its material part it appears plainly that the affiant could not swear to the first specific substance required by the Statute, viz: 'that the private dwelling occupied as such * * * is being used for the unlawful sale of intoxicating liquor'. He therefore resorted to swearing to his own 'positive' conclusion that 'it is

> used in part for business purposes, to wit, for the manufacture of liquor'. His conclusion is drawn by inference from his sole allegation of fact, viz 'that he perceived the fumes of certain intoxicating liquor in the process of manufacture'."

The doctrine announced by the Supreme Court in the Berkness case is only in conformity with the previous rulings of the Ninth Circuit Court of Appeals and with practically every other Court in the United States. The particular question involved in this case has been repeatedly passed upon by this Court.

After this particular question has been presented three times to the Ninth Circuit Court of Appeals it finally, in Schroeder vs. United States, 14 Fed. (2) 500, uses the following clear, concise and emphatic language, which we feel disposes of the issue:

> "The judgment in this case cannot be sustained without overruling Temperani vs. United States, 299 Fed. 365, and Bell vs. United States, 9 Fed. (2nd) 820. Adhering as we do to the views there expressed, the judgment in this case must be reversed."

Under Section 3462 of the Revised Statutes providing for the issuance of a "search warrant, authorizing any internal revenue officer to search any premises * * if such officer makes oath in

writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of said premises."

There is a division of opinion as to whether or no search warrants are properly issuable to federal prohibition agents under the internal revenue laws, but unquestionably, the better view of the situation is that they can not be so issued. (U. S. vs. Spencer, 292 Fed. 871; U. S. vs. American Brewing Co. 296 Fed. 772.)

The purpose of the National Prohibition Act is to enforce the Eighteenth Amendment, and the agents appointed in pursuance of its provisions by and through the Internal Revenue Commission are employed with this end in view. They are not, so to speak, internal revenue officers having in view the prevention of the commission of fraud upon the internal revenue. The internal revenue officers contemplated to act on information and belief under the provision of Section 3462, Revised Statutes, are persons of authority having usually practical experience and generally act advisedly, either by reason of their own familiarity of laws governing in their situation or on advice of the Attorney General or his assistants. Again, the act authorizing the employment of the so-called prohibition agents does not contemplate that these agents assume the role of internal revenue agents, nor resort to any other than the means of search

provided by the act authorizing their appointment; otherwise, the provisions governing in the issuing of search warrants should not have been inserted.

However, in the case at bar there was not even the pretense of getting a search warrant; none was provided; none was deemed necessary, and the thought of bringing the prosecution under the internal revenue law was not conceived until the indictment, as the defendants were originally charged under the National Prohibition Act by the United States Commissioner, and then only conceived in order to avoid and evade the consequence of their unlawful and illegal search and seizure.

In Veeder vs. United States (C. C. A.), 252 Fed. 414, Baker, Chief Justice, speaking for the Circuit Court of Appeals for the Seventh Circuit, said:

> "One's person and property must be entitled, in an orderly democracy, to protection against both mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike. One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he is armed with a search warrant. No

search warrant shall be issued unless the judge has first been furnished with facts under oath —not suspicions, beliefs, or surmises—but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guess work."

In United States vs. Premises, 246 Fed. 185, the Court said:

"Mere belief and suspicion are not enough; 'probable cause' within the meaning of the Constitution arising only from facts and circumstances sufficient to create in the minds of men of average prudence a reasonable belief that a crime has been committed, and that the guilty person or the instruments or fruits of crime are in certain premises. Then only can a warrant of search and seizure issue. In the instant case there is no more than suspicion."

The testimony in this case can be best described by taking it from the lips of the Tacoma Prohibition Officer, W. H. Kinnaird, as follows:

Q. Mr. Kinnaird, the premises were a dwelling house? A. Yes, sir, it was a dwelling house.

Q. Your agent didn't have a search warrant? A. Well, it is hearsay. I didn't see a search warrant.

Q. You know there was no search warrant. THE COURT: They both answered that they did not.

Q. The premises belong to the defendant, Frank Alvau? A. I could not say whether they do or not.

Q. Well, he lived there? A. Yes, he lived there.

Q. It was his dwelling house? A. Yes, he was living there.

Q. And he lived there with his family, his two children—his wife and his two children? A. Yes. The place was in a state of cultivation. There was a garden and a cow.

Q. Now, you had been out in this locality before, sometime before this 12th day of July, of course? A. I had been by there, yes.

Q. And you had a suspicion then that the place should be searched? A. I had a suspicion that the place should be investigated.

Q. And that was about two weeks before the time that it was investigated? A. Yes, sir.

Q. And this suspicion arose because someone had told you that Frank had chased away people who were picking flowers. A. Yes.

Q. But you didn't bother to get a search warrant. And how far from the highway is the house—the nearest point on the highway, or how far— A. I

have only been to the premises from one way and that is from the road down to Redondo.

Q. There is a fence about the place, around the place? A. I didn't go into the back. There is in front and along the side.

Q. You didn't go there originally with the agents? A. I did not.

Q. You sent the agents out there? A. I did.

Q. Told them to go out and investigate and see if they could find a still? A. Yes, sir.

Q. And that was based upon the information that you had secured, as you related, a couple of weeks before that time? A. Yes, sir. (Tr. p. 113-114.)

In re Tri State Coal & Coke Co., 253 Fed. 605, Judge Thomson said:

> "These cases all recognize not only the binding force of this constitutional provision, but its high necessity to protect the sanctity of the home and the privacies of life; that this protection is so broad and ample, that it embraces all persons, even those accused of crime, and that the duty of giving it full effect rests upon all entrusted under our federal system with the enforcement of the laws. * * * Under section 5, title 11, the affidavit * * * must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist."

An examination of the textbooks on criminal procedure, discloses no suggestion that either at common law or under any statute, a search warrant may be issued upon an affidavit in which only the belief or suspicion of the affiant is given as the basis for the application.

In Giles vs. United States (C. C. A.), 284 Fed. 208, Justice Anderson speaking for the Circuit Court of Appeals for the First Circuit said:

> "There is in this search warrant no mandate to seize any property, much less any specific description of the property to be seized."

The learned trial court was well advised that he had previously been reversed by the Circuit Court as shown by his memorandum opinion, refusing a new trial (Tr. p. 40) wherein the following language was used:

> "Much of the comment of the writer in Cala's case, 17 Fed. (2) 829, reversed, 22 Fed. (2) 742, Herter's Case, 24 Fed. (2) 111, reversed, 27 Fed. (2) 521, applies to the instant cases and is incorporated by reference."

And still in the face of the knowledge that he had, that this same question has been determined by the Circuit Court, he persists in presenting this question again to the Appellate Court. The learned trial court's view of the application of the law to this particular case is entirely inconsistent with

any authority and even with his own opinion in the case of United States vs. Premises, 246 Fed. page 185, at pages 186 and 187, where the following language is used:

> "It originated in old English law that 'every man's house is his castle'. Mere belief and suspicion are not enough. 'Probable cause' within the meaning of the constitution arising only from facts and circumstances sufficient to create in the minds of men of average prudence a reasonable belief that crime has been committed, and that the guilty person or the instruments or fruits of crime are in certain premises, then only can a warrant to search and seize issue. In the instant case is no more than suspicion. Furthermore, the search and seizure is for Pohl's private books and papers, and that is forbidden by said Amendment in that it is 'unreasonable', Boyd vs. United States, 116 U. S. 635. And the warrants must be refused for another reason. The Fifth Amendment to the Constitution declares no person 'shall be compelled in any criminal case to be a witness against himself'. This Amendment forbids search and seizure of private books and papers, for in legal contemplation such search and seizure does compel the owner 'to be a witness against himself'. By the most potent evidence his writings and records. (Citing cases). These

constitutional provisions were designed to check great evils well known to the founders of this Republic. They are as valuable and necessary in war as in peace, and to be respected in both. They are principals of humanity and civil liberty which had been secured from the mother country only after years of struggle. The duty of giving them 'force and effect' is obligatory upon all entrusted under our federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful seizures * * * should find no sanction in the judgments of the Courts, which are charged at all times with the support of the Constitution, and which people of all conditions have a right to appeal for the maintenance of such fundamental rights. Weeks vs. U. S., 232 U. S. 392. 'Papers are the owner's goods and chattels. They are his dearest property, and are so far from enduring a seizure that they will hardly bear an inspection'. A law permitting their seizure 'would be subversive of all the comforts of society * * * . Our law has provided no paper search to help forward the conviction. Whether this proceedeth from the gentleness of the law toward criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the

public, I cannot say. It is very certain that the law obligeth no man to accuse himself. Because the necessary means of compelling self accusation fall upon the innocent as well as the guilty would be both cruel and unjust, and it would seem that search and evidence is disallowed upon the same principle; then, too, the innocent would be confounded with the guilty'. Lord Camden's decision in the celebrated case of Seditious Libel (1765) cited and followed in Boyd vs. United States, 116 U. S. 626. The warrants are refused."

Point II

The learned trial court in his endeavor to again present the same question to the Circuit Court of Appeals, which it had previously decided, tries to distinguish between the character of the crimes, but it is not a question of the character of the crimes as here involved, but rather of the rights of a person under the Fourth and Fifth Amendments to the Constitution of the United States, and violation of Article I, sections 6 and 9 of the Constitution of the State of Washington, guaranteeing the person against unlawful search and seizure in his home.

I feel that the foregoing authorities will dispose of this question, viz: Amos vs. U. S. 255 U. S. 313; Boyd vs. U. S. 116 U. S. 616; Silverthorne Lumber Co. vs. U. S. 251 U. S. 385; Weeks

vs. U. S. 232 U. S. 383; Gouled vs. U. S. 255 U. S. 298.

The effect of the Fourth Amendment is to put the courts of the United States and federal officers under limitations and restraints in the exercise of the power and authority imposed upon them, and thereby secure the citizenship of the country against all unreasonable searches and seizures, and this protection reaches all alike, whether accused of crime or not.

The Eighth Circuit Court of appeals in passing upon such a warrant, lays down the following rule in Siden vs. United States, 9 Fed. (2d) 241, at pages 242 and 243:

> "The probable cause indispensable to the lawful issue of a search warrant under these Sections of the Act of Congress (Comp. St. 1918—Comp. St. Ann. Supp. 1919-10496¼C., 10496¼ E) is the legal conclusion of the Magistrate from the facts stated in the affidavit, deposition or testimony. Without a statement in those affidavits, depositions or testimony of facts sufficient to sustain such a conclusion, the search warrant may not lawfully issue. The statement of the sustaining facts showing probable cause is as indispensable to the lawful issue of a search warrant as the legal conclusion that such cause exists. When the facts on which the Magistrate's conclusion of probable cause is based are not stated in the affidavit, deposi-

tion, or testimony on which that conclusion rests, the warrant cannot be sustained, because there is no criterion by which a Court can determine whether or not there were facts showing probable cause, and the unavoidable legal conclusion is that there were not.—Citing cases."

Another case quite in point is Brown vs. United States, 4 Fed. (2nd) 246, 9 C. C. A., wherein the following language is used:

"If, instead of arresting the plaintiff in error the officer had presented all the facts within his knowledge and all the information at hand to a magistrate, no magistrate would issue a warrant of arrest for the plaintiff in error to answer for a crime before another tribunal. No Grand Jury would indict; no Court would sumbit the case to a jury, and if the officers were sued for false imprisonment no Court would instruct that the arrest was justified. Assuming all the foregoing testimony to be true, if we are correct in these conclusions, and we see no escape from them, the arrest was without authority of law, and the property unlawfully seized was not admissible in evidence."

Again in Mason vs. Rollins, Fed. Cas. 9252, the Court states: Section 3462 of the Revised Statutes provides:

"The several judges of the Circuit and District Courts of the United States, and commissioners of the Circuit Courts, may, within their respective jurisdictions, issue a search warrant, authorizing any internal revenue officer to search any premises within the same, if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by use of the said premises."

With reference to this section the Attorney General said:

"The section providing for the issue of these search warrants does not state all of that which must be stated in the application therefor. The Fourth Amendment to the Constitution provides that 'no warrant shall issue, but upon probable cause supported on oath or affirmation, and particulaly describing the place to be searched, and the person or things to be seized.' The determination of the question whether this requirement and those of the section referred to have been met, and whether the warrant should issue in a particular case, is a highly responsible and important duty; but however responsible and important, no provision is made in the section referred to, nor elsewhere, for its compensation."

24 Opinions of the Attorney General, 685, 688.

Under the federal laws no search of a dwelling that is searched without a search warrant can ever be justified.

Point III

Although the petition to suppress was duly and timely filed before the trial, the court precluded the defendant Alvau from having the petition determined prior to the trial, and thereby prevented the defendants from having a fair and impartial trial, and the defendants were prejudiced by being compelled to try a collateral issue before the jury, when the same should have been decided as a matter of law before the trial.

It is well settled that any objection to evidence secured through an illegal search should be made by motion before a trial for the reason that if it were considered at the trial it would raise a collateral issue and, as was said by Mr. Justice Day in the Adams case, "would halt the orderly progress of the cause and consider incidentally a question wholly independent thereof."

The trial court refused to determine the petition to suppress the evidence, which was timely made, but "in the economy of time and procedure in a court congested as are all federal courts, with more cases than can be speedily tried, the greater part of which are petty matters of police filched from the states (See Yellowstone Bank Case, 277 Fed.

71), and which ought to be tried in federal police courts, the motions were heard in trial of the cases, defendants to have the benefit if of merit." (Tr. p. 40).

Counsel for the defendants were insistent that the matter of the petition to suppress be disposed of prior to the trial, as indicated by the following proceedings:

MR. CHAVELLE—I am ready for trial, except that there is a petition to suppress, which I under stand your Honor is going to—

THE COURT—I will pass on it after I have heard the trial.

MR. CHAVELLE—May I make the motion, so that the record will show it was timely made?

THE COURT—Yes.

MR. CHAVELLE—In a few words, it is this, that the private dwelling house of the defendant Frank Alvau was searched in the night time without a search warrant.

THE COURT—Haven't you your motion on file?

MR. CHAVELLE—Yes.

THE COURT—What is it you want to do?

MR. CHAVELLE—For the purpose of making the record, for the purpose of permitting the Court to rule and allow me an exception, I wanted to show that the motion was disposed of or came up timely. It has to be made.

THE COURT—The record will show for itself. It shows that it is filed. The Court has said it will not hear it until it hears the trial of the whole case. It will be tried together. If you are entitled to the final motion, you will get it then.

MR. CHAVELLE—Will Your Honor allow me an exception to the Court's ruling? THE COURT—Yes. (Tr. p. 96-97).

Instead of this question, therefore, having been determined in an orderly manner the court proceeded to try the collateral issue as to whether or not the search and seizure was illegal and unlawful, before a jury, instead of determining the matter as a question of law, over the objection of the defendants, and precluded them from having a fair trial and prejudiced them before the jury by his remarks as follows:

> "It appears from the evidence of the officers, that they went to this place to investigate. When they got within a distance of the house or premises they smelled fermenting mash. As they came closer to the buildings it got stronger, and as they got near the residence they smelled not only the mash but the odor of kerosene and of the still in operation.
>
> "These officers were not alone prohibition agents, but they had the authority of revenue officers. The premises was a distillery. They found this still below, that had been recently

operated, and they found the mash. That comes under the Revenue Statute. The law is that revenue officers may enter a distillery at any time to discover who is operating it, gauge the liquor and destroy anything that is illegally being carried on, which these officers did. They cannot camouflage a distillery like this one by having the entrance in a dwelling house so they cannot enter.

"The Court rules that the evidence was legally secured and is competent. Therefore, the motion is denied."

MR. CHAVELLE—Exception.

THE COURT—It will be noted.

MR. CHAVELLE—At this time, I move to strike all the testimony— THE COURT—Motion denied.

MR. CHAVELLE—(Continuing)—of each and every one of the Government's witnesses.

THE COURT—Exception.

MR. CHAVELLE—I make a motion at this time for a directed verdict. THE COURT—Denied.

MR. CHAVELLE—Note an exception. (Tr. p. 118-119.)

These remarks were directed to the jury and there was nothing under the circumstances that could secure for the defendants or either of them

a fair trial, as to whether they were guilty or not guilty, for the Court by his opinion found the defendants and both of them guilty of operating a distillery, and by his remarks to the jury directed them to find the defendants guilty.

POINT IV

The Court erred in limiting the cross examination of the Government's witness, W. H. Kinnaird, as follows:

The prosecuting attorney had been permitted to examine Kinnaird at great length. When he was turned over to the defense for cross examination he was immediately interrogated as to matters pertinent to the issue, viz: that of determining whether the search and seizure were illegal and unlawful:

Q. Mr. Kinnaird, the premises were a dwelling house? A. Yes, it was a dwelling house.

Q. Your agent didn't have a search warrant? A. Well, it is hearsay. I didn't see a search warrant.

Q. You know there was no search warrant. THE COURT—They both answered that they did not.

Q. The premises belong to the defendant, Frank Alvau? A. I could not say whether they do or not.

Q. Well, he lived there? A. Yes, he lived there.

Q. It was his dwelling house? A. Yes. He was living there.

Q. And he lived there with his family, his two

children—his wife and his two children? A. Yes. The place was in a state of cultivation, there was a garden and a cow.

Q. Now, you had been out in this locality before, sometime, before this 12th day of July, of course? A. I had been by there, yes.

Q. And you had a suspicion that the place should be searched? A. I had a suspicion that the place should be investigated.

Q. And that was about two weeks before the time that it was investigated? A. Yes, sir.

Q. And this suspicion arose because someone had told you that Frank had chased away people who were picking flowers? A. Yes.

Q. But you didn't bother to get a search warrant. And how far from the highway is the house—the nearest point on the highway, or how far— A. I have only been to the premises from one way and that is from the road down to Redondo.

Q. There is a fence about the place, around the place? A. I didn't go into the back. There is in front and along the side.

Q. You didn't go there originally with the agents? A. I did not.

Q. You sent the agents out there? A. I did.

Q. Told them to go out and investigate and see if they could find a still? A. Yes, sir.

Q. And that was based upon the information

that you had secured, as you related, a couple of weeks before that time? A. Yes, sir.

Q. Did you notice the sill of the door was broken—the celar door? A. I don't know whether I did or not. I don't believe I did.

Q. You didn't look, did you? A. I don't know whether I did or not.

Q. You had a case report made in this matter? A. Yes.

Q. By these agents? A. I made a report to Mr. Whitney.

Q. And did you state in the report that the agents got out there to the premises at three o'clock in the morning? A. No, sir.

Q. You didn't state that? A. No, sir.

Q. Referring to your testimony before the United States Commissioner—I am now reading from a transcript of the testimony, a copy of the transcript—the original transcript is on file with the Court, attached to the petition to suppress—I will ask you whether or not in your testifying on the 20th day of July, 1928, at 2 o'clock p. m. before the Honorable H. G. Fitch, United States Commissioner, at Tacoma, Washington, you stated as follows:

> "Q. Don't you keep any record of your officers' movements? A. I can't tell. I'll testify to what time they got out there. Q. Do you know? A. I have their record. Q. What time

did they say they got out there? A. Three o'clock in the morning. Q. That is their record, is it? A. Yes.

Q. Did you so testify at that time and place? A. I testified that they left town about three o'clock in the morning. I told you at the hearing that I had that record. I said it was hearsay.

Q. Did you so testify? I haven't asked you for anything else. A. Yes, I testified before the Commissioner there.

Q. When? What time they left town and what time they got out there— You heard my question. A. That is like I told you, I say I could not tell you what time they got out there.

Q. Did you understand me? A. Yes.

Q. Did you understand it perfectly? A. Yes, sir.

Q. There is no mistake. Did you so testify? A. I testified before the Commissioner, yes.

Q. That the agents arrived at Frank Alvau's place at three o'clock in the morning? A. As far as I knew, yes.

Q. And according to this record? A. I don't know whether my record shows that or not.

Q. That is what you testified to. Did you so testify? A. I testified according to that record there.

Q. Now, this was not a saloon, or a public place or a—

THE COURT—That stands admitted. You must prepare your case out of court, on your time, not in here on my time and the jury's.

Q. Did you take anything away from the place beside the contraband, there; did you take a gun, for instance? A. One of the agents seized a gun, yes.

Q. I will ask if you testified before the United States Commissioner in Tacoma, at the same time and place, as follows:

> "Q. Had someone advised you that the still was there? A. Yes, sir. MR. DEWOLFE—I object as not proper cross examination. Q. (Continuing) Told you the still was there? A. No. They didn't tell me the still was there, but they said it was a suspicious place, and I sent the boys out to see."

Q. Is that what you testified to? A. Yes, sir.

Q. Now, how far is this place from Redondo? A. I would say around a half mile.

Q. And how far is that from this courthouse? A. I could not tell you; I said it was a half a mile from Redondo, about.

Q. And how far is it from here, do you know? A. I don't know.

Q. And the—

THE COURT—Vacate the stand. You are referring to a transcript. MR. CHAVELLE—I was trying to refresh my recollection from the trans-

cript, your Honor. Note an exception. THE COURT—Let it be vacated.

(Thereupon the government rested.) (Tr. p. 113-118.)

That is all of the cross examination that the defense was permitted of Kinnaird. The transcript in question represented Mr. Kinnaird's former testimony before the United States Commissioner at Tacoma, and is set forth in transcript, pages 11 to 35.

The conduct of the trial court in precluding the cross examination of this, the government's most important witness, and the manner in which he proceeded to preclude the defendants, by prejudicing them before the jury, and the comments made by him at the time of his ruling when a question pertinent to the character of the place was being asked:

> "Now, this was not a saloon, or a public place or a—
>
> THE COURT—That stands admitted. You must prepare your case out of court, on your time, not in here on my time and the jury's." (Tr. p. 116.)

And again, when counsel, in attempting to lay an impeaching question, proceeded to read from the transcript what the agent had tesified to before the United States Commissioner:

"THE COURT—Vacate the stand. You are referring to a transcript."

And the stand was vacated, and the consequence was that the cross examination of the witness was not completed.

The jury was prejudiced by the conduct of the court against both the defendants and their counsel, and the defendants were precluded from getting a fair trial. The jury had been excused until three o'clock in the afternoon, were examined and empaneled and sworn to try the case. Counsel for both sides made opening statements.

The matter of the trial and the motion to suppress the evidence at the instant of the trial judge were both heard.

The witnesses for the government were examined and cross examined, except as restricted by the trial court.

The defense witnesses were sworn and examined and the case summed up by both sides, and from three o'clock in the afternoon until 5:10 on the same afternoon, when the trial of the case was completed, eighty pages of testimony had been taken.

The original charge, before the Commissioner, was filed for the violation of the National Prohibition Act, and it was pertinent to inquire of the witness whether or not these premises were excepted under the law, particularly in view of the

fact that the Court was contending the "dwelling house" was a "distillery". (Tr. 35-37, 81.)

POINT V

THE COURT ERRED in permitting Mary Alvau, the wife of the defendant, Frank Alvau, to testify against her husband over his objection and without his consent. It was necessary by reason of the unusual ruling of the Court that the matter of the suppression of the evidence should be heard before the jury.

Mary Alvau, the wife of one of the defendants, who had verified an affidavit in support of the petition to suppress, which the Court had refused to consider and insisted that the witnesses be called. Therefore, in compliance with the Court's order Mary Alvau was called and examined regarding the invasion of the dwelling house of herself and her family by the prohibition agents. Then counsel for the government over the objection of the defense was permitted by the trial court to ask:

> "MR. DEWOLFE—You knew the still was down there, didn't you?
>
> "MR. CHAVELLE—I object to that as immaterial. It is not cross examination.
>
> "THE COURT — She may answer. Overruled.
>
> "MR. DEWOLFE—You knew the still was down there, didn't you? MR. CHAVELLE—Exception, Your Honor. MR. DEWOLFE—

What is that? MR. CHAVELLE—Allow me an exception. THE COURT—Yes.

"Q. Didn't you know your husband went down there and ran the still? MR. CHAVELLE — Objected to for the same reason. A. I don't know. THE COURT—Overruled. MR. CHAVELLE—Exception.

"Q. You didn't see any still paraphernalia or manufacturing articles down there at all, never have been. A. After the federals came there I heard about lots of things and see this in there and that was—well, that is all.

"Q. Who does that still belong to? It belongs to your husband, doesn't it?

"MR. CHAVELLE—Objected to as leading and suggestive and not proper cross examination. THE COURT—Overruled. A. I don't know.

"Q. You don't know the still belongs to him? A. May belong to him and may not. MR. CHAVELLE—Same objection.

"THE COURT—I think you have pursued that far enough. MR. CHAVELLE—Note an exception. (Tr. p. 82-83.)

This is clearly an invasion of the defendant's rights, to compel the wife to testify against her husband, contrary to the laws and statutes of the State of Washington, and precluded the defendants from having a fair trial.

Point VI

The Court's investigation of the subject of the motion to suppress the evidence in the presence of the jury was prejudicial to the defendants and had no place in the trial. If the Court had wished to investigate a collateral matter, the jury should have been excused. The whole procedure was over the persistent objection of the defense. The Court tells the jury:

> "They cannot camouflage a distillery like this one by having the entrance in a dwelling house so they cannot enter." (Tr. 82.)

Point VII

The Court's instructions to the jury precluded the jury from functioning, by giving the defendants a fair trial, denying to them the right to trial by jury by usurping the powers of the jury and precluded the defendants from receiving a fair trial.

However far the trial court might go into the matter of directing a verdict of guilty by prefacing his remarks with statements that "The facts, what witnesses to believe, the inferences to draw from the circumstances, is entirely your function." And then continuing:

> "Are they counting upon a lack of intelligence in the jury box to persuade you to believe any sort of a puerile or silly story? Remember, you are not obliged to believe a thing is

so, simply because some witness swears it is so. A witness can swear to anything, but whether it is to be believed or not is a matter for your judgment. As my predecessor in Montana, Judge Knowles, used to say, you are not obliged to believe anything solely because it is sworn to. A witness may take the witness stand and swear strongly that down the street he saw an elephant climb a telegraph pole, but you are not obliged to believe it, even if he takes you down and shows you the pole. I tell you, Gentlemen of the Jury, I have heard them just about swear to that in court, and so have you. Your judgment will determine where to place credibility and not allow yourselves to be deceived or to be deluded by statements that have no basis other than in the heart of the man who has no consideration for his oath on the witness stand. There is a maxim of the law that a witness false in one particular should be distrusted in others, and if your judgment approves you can reject all his testimony.

"As to the evidence in this case, as the Court has stated to you it is its duty to pass upon the competency and admissibility of the evidence, and when it has done so and allows it to go in evidence, all questions in respect to that are foreclosed in the case and you accept the evidence and consider it. The

officers go out to this place occupied by the defendant Alvau and his family, a little farm, house and barn, as they had a right to do. They had a right to do it for several reasons: First, because it is a violation of the revenue laws, and these same revenue laws provide that the officers of the government have a right to enter a distillery at any time and discover who is operating it, gauge the liquors, and to assess and collect the taxes, and to destroy contraband utensils and production. So they enter properly; they find Alvau upstairs; after a long search they discover this distillery. You can see the length to which the lawbreaker goes to foil the efforts of the government to maintain the laws and to punish the criminal. It took them several hours to find the secret opening into this distillery in the basement. And when they got in there, what do they find? They find Rossi in there, and they find the still. The still had been operating; it was operating when they went there; they smelled its operation. They find a still five feet in diameter; they find a thousand gallons of mash, a full-fledged distillery, Gentlement of the Jury, and the three officers, Carr, Griffith and Kinnaird, all told you that Rossi told them he came there the day before to work awhile with and for Alvau.

"Now Rossi takes the stand and tells you

that he just was out there on some business of renewing insurance policies, and, hearing a clamor outside, Alvau hid him in there to hide him from prospective burglars, although the children and wife were allowed to take their chances with the desperate burglars that were expected to be outside; and he says he was not working there at all, did not know anything about the still; that it happened that he got up and simply put on Alvau's overalls instead of his own clothes because his had fallen down. That is his statement of how he came to be in this guilty situation which the officers have described. He denies that he told them he was working there also. Which do you prefer to believe, the three officers of the United States, the police, the sheriff of the United States, the same as the police and sheriff of the states, with a duty to discharge and discharging it under great difficulties always, as you well know; or will you believe the man who is charged with serious offenses, the consequence of which will be serious to him, at the lightest, if convicted? And ask yourselves whether his self-interest, which is the strongest motive that moves any man to act, has inspired him to state to you this account of his situation there in order to persuade you to believe it, or hoping that there is a fellow feeling in the breast of some

juror which would inspire him to accept it, or at least to entertain a reasonable doubt so as to secure an acquittal and go free of these offenses, if he committed them. It is not necessary that he should have owned the still or the premises. He who aids another to violate the law is himself as guilty as the principal actor. One who gets another to commit a crime for him, and it is committed, is as guilty of the act as he who did commit it. If one man employs another to work on a still is running in violation of the law, the man employed is as guilty as the employer.

"So that is the situation and the case for you, Gentlemen of the Jury. The Court need not go over the evidence any further.

"So far as Alvau is concerned, I understood from counsel's argument that there is really no denial that he is involved; it is simply a question of law to be tried out in the appellate tribunal. He did not testify in his own behalf. The law is, when he does not, from that mere fact alone you will draw no inference against him. But there is the situation of this place. I need not comment on the testimony of the wife that she did not know it was there. It is wholly immaterial whether she knew it or not, but the question whether that is one of the stories like that of the elephant climbing a pole is a matter you may consider. So that

> the case does not depend at all upon that part of her testimony. She did testify—and you will take her testimony in consideration in determining her credibility — she did testify that Rossi had simply come there on account of the insurance. What else he came for, if she did not know there was a still there, she probably would not know.

Proper exceptions were taken to the Court's instructions. (Tr. p. 138-143.)

The question is: Did the defendants receive a fair trial? If the province of the jury can be invaded by the trial judge, with instructions of this character, then the right to trial by jury should be abandoned and the necessity of the instructions would be unnecessary. "In the economy of time and procedure" the Court should direct the verdict of guilty, and the sham and time consumed in instructing the jury, and permitting them to return the verdict of guilty, would be unnecessary.

The trial Court's position in this case in proceeding to try before the jury the question of the motion to suppress the evidence, clearly a collateral matter, which was purely a question of law for the Court to determine, and is his duty to have determined before the trial of the case; the denial of the motions to suppress the evidence and the motion for a directed verdict, demands that the case should be reversed and remanded to the

trial court with instructions to grant the petition to suppress the evidence heretofore admitted to trial, and to grant the motion of the appellants in arrest of judgment, and for a new trial; that the judgment of the case should be reversed, the evidence and testimony heretofore admitted suppressed and the defendants granted a new trial.

Respectfully submitted,

JOHN B. WRIGHT,

EDWARD H. CHAVELLE,

Attorneys for Plaintiff in Error, Frank Alvau and Humbert Rossi.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5746

FRANK ALVAU and HUMBERT ROSSI,
Appellants.

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE M. BOURQUIN, *Judge*

Brief of Appellee

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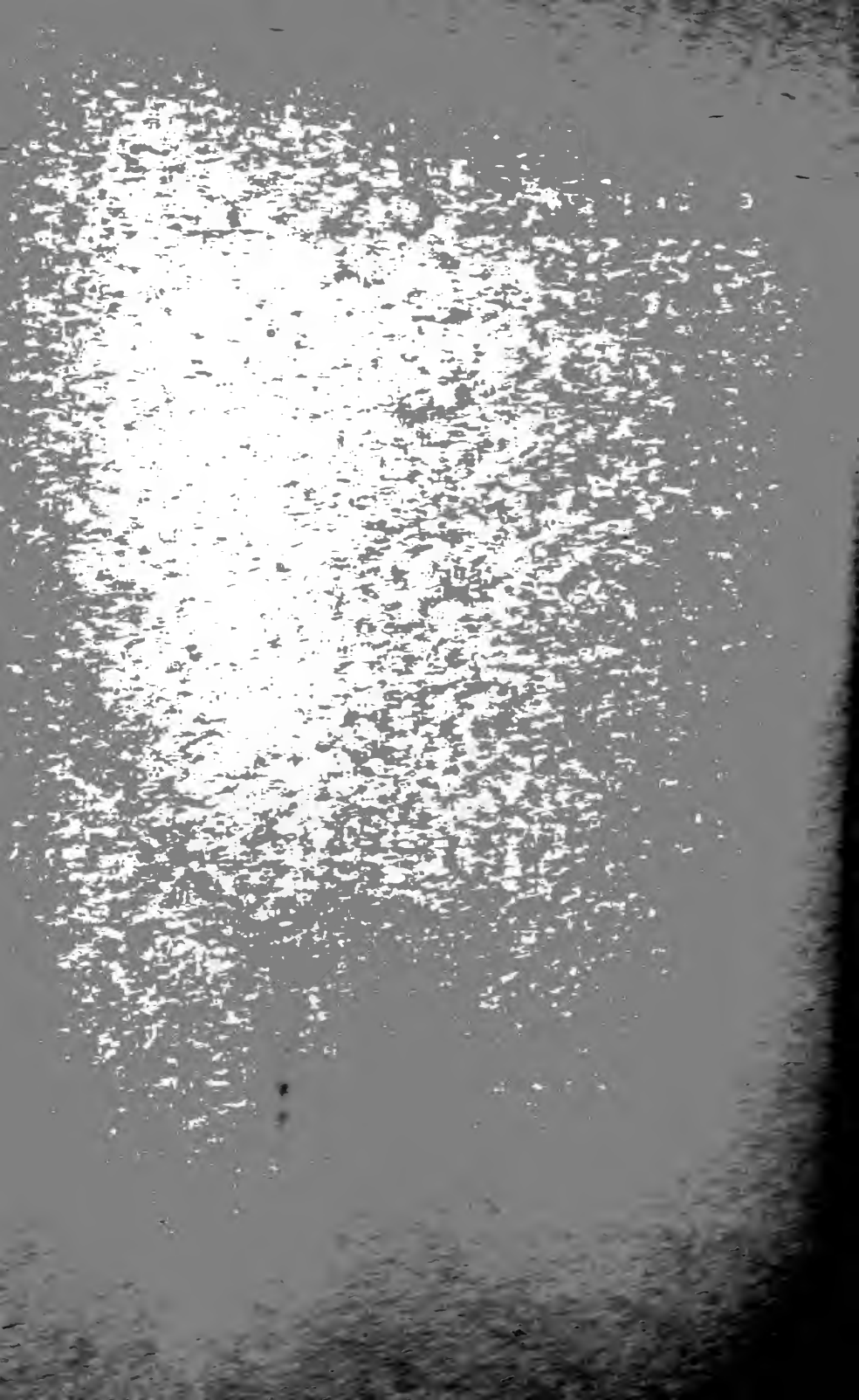

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STATEMENT OF THE CASE

The defendants herein were indicted in three counts for the violation of Sections 3266, 3281 and 3282 Revenue Statutes of the United States. Count I of the Indictment charged the defendants with the fermentation of one thousand gallons of mash fit for dis-

tillation; Count II charged them with operating a still in a dwelling house; and Count III charged them with operating a still without bond.

The evidence, as shown by the Bill of Exceptions in the records (Tr. 93), shows that on the twelfth day of July, 1928, prohibition agents went to the premises of Frank Alvau, which premises are located in King County between Seattle and Tacoma at a place called Redondo, arriving there early in the morning. When several hundred yards from the defendant's house, the agents smelled the odor of mash emanating from the premises. On nearing the house and barn of the defendant Alvau, the agents smelled the kerosene burners on the still. A complete still was found in a full concrete basement and still-room which concrete basement and still room were under a lean-to, and set out from the rest of the house, and the only means of entrance to the still room was through a small door about two feet wide leading from the basement to the still room. The officers searched defendant Alvau's home and after some time discovered the still room. The still door weighed about five hundred pounds, and Alvau explained to the officers how he got the still into the still room. The officers testified that the still room was off to one side of the house. A

large quantity of mash was found in the still room, together with a still and some moonshine whiskey found in a barrel.

Defendant Alvau did not take the stand in his own behalf, but defendant Rossi, who was found in the still room by the officers at the time of the search, which search was made without a search warrant, testified that he was Alvau's guest and went to Alvau's home for the purpose of selling Alvau and his family some insurance policies.

Before the officers went into the house they smelled the odor of mash and discovered a mash refuse pool or sump pit (Tr. 99).

By timely motion, defendant Alvau moved, prior to trial herein, to suppress the evidence, on the ground that his home had been illegally searched the evidence used in this trial illegally obtained because the officers had no warrant. In his petition to suppress, which was renewed by Alvau at the time of trial, and in which Alvau was the sole petitioner, defendant Rossi did not join. At the time the Government's exhibits which were mash, whiskey, and portions of the still, found on Alvau's premises were offered in evidence,

counsel for the defendants objected to their admission. The case is now before this Court on the question of the legality of the search and seizure.

Following are the specifications of error relied upon by the appellants to sustain their appeal.

ARGUMENT

As to the defendant Rossi, it will be seen by this Court at once that none of his constitutional rights under the Fourth and Fifth Amendments to the Constitution of the United States were impaired or in any way violated, because he failed to join in the petition to suppress, which was interposed by his co-defendant, Frank Alvau (Tr. 5), and for the further reason that an examination of the entire record will show that at no time did he assert any interest, either in the premises that were searched or the articles that were seized.

Defendant Rossi testified (Tr. 124-125) that he had been invited to Alvau's place to stay for the evening when arriving there late one night on a mission of selling insurance to the Alvaus. He stated that he

heard the prohibition agents early in the morning and thought they were burglars, and therefore went down and hid in the still room. In this manner he attempts to account for the guilty situation in which he was found, to-wit: his appearance in the still room when the same was searched by the officers and the fact that he had mash on his clothes. Nowhere in the record will be found any affidavit, petition, or sworn oral testimony on the part of the defendant Rossi that he had any interest in the property seized or the premises of Alvau that were searched.

It has frequently been held that where the defendant denies jurisdiction over premises searched and denies ownership of the property found on such premises, he is not in a position to raise the question that the search and seizure were illegal and unlawful. *McMillan vs. United States*, 26 Fed. (2nd) 58; *Graham vs. United States*, 15 Fed (2d) 740; *Cantrell vs. United States*, 15 Fed. (2d) 952; *United States vs. Gass*, 14 Fed. (2d) 229. It has also been held that evidence obtained as the result of violating the right of privacy of one defendant through search and seizure without a legal warrant did not render it admissible against a co-defendant. Inasmuch as no motion to suppress was filed on the part of Rossi prior to the time the

case was called for trial, or at any time, the legality of the search and seizure cannot therefore be properly questioned by him. *Harkline vs. United States*, 4 Fed (2d) 526; *Souza vs. United States*, 5 Fed. (2d) 9; *Weeks vs. United States*, 232 U. S. 383, 58 L. Ed. 652.

The petition to suppress in the instant case, interposed by the defendant Alvau, it is contended by the Government, is fatally defective because it does not assert defendant Alvau had any interest at any time in the articles which were seized and offered in evidence in the instant case at the time of trial and admitted in evidence by the Court. As stated hereinabove, it is elementary that where a petition to suppress does not assert an interest in the articles seized, the question of the infringement and impairment of the defendant's constitutional rights, if any, under the Fourth Amendment, cannot be considered. The defendant Alvau's petition to suppress in the instant case is therefore fatally defective. *Shields vs. United States*, 26 Fed. (2d) 993; *Heywood vs. United States*, 268 Fed. 795.

Appellant Rossi's fourth assignment of error states that the Court erred in refusing a directed verdict for Rossi because he was not required to file a bond nor to pay the taxes charged in Counts II and III

of the Indictment herein, and that the evidence, if it showed at all that he was implicated in the crime charged, showed that he was an aider and abetter, and not being the principal could not be liable for the taxes and the bond as charged in said Counts

We think a recent decision of this Court shows the fallacy of defendant Rossi's contention that because he was not a principal he therefore could not be guilty of operating the still in question without a bond. In *Vukich vs. United States*, 28 Fed. (2d) 666, wherein the defendant was charged with running a still without a bond, it was held that where he knowingly delivered supplies to an unlawfud distillery, he was liable as a principal for aiding and abetting in an unlawful business, and was therefore guilty as a principal of running the still without a bond. The instant case, it seems, is in all fours with the *Vukich* case. Moreover the evidence as to Rossi and his participation in the crime charged was ample to go to the jury, for he was found by the officers at the time of the search in the still room with mash on his clothing, and when asked to turn on the light for the officers, he did so. (Tr. 130).

It is attempted in the brief of counsel for the defendants, to discredit the testimony of prohibition

agents by showing inconsistencies between their oral testimony in Court and their affidavits, and the testimony before the UnitedStates Commissioner, at which hearing it was sought to have the evidence introduced in the present case suppressed. However, it is a well-settled rule of the law that exparte affidavits prepared for signature of witnesses have not the same evidentiary value as sworn testimony of the same witnesses in open court. *Lindsay vs. United States*, 7 Fed. (2d) 248. Moreover the transcript of the testimony before the United States Commisioner, although a part of the transcript of the record herein, is not properly a part of said transcript and being not properly before this Court because not admitted in evidence or incorporated in the Bill of Exceptions, the same cannot be considered now by this Court. *King vs. United States*, 1 Fed. (2) 931. The record shows that the trial judge refused to admit in evidence one of defendant's exhibits which was the testimony before the commissioner attached to the petition to suppress. (Tr. 134).

It is contended by counsel for the appellants in this case that the trial Court erred in refusing to rule on defendant's motion to suppress until all the evidence was in at the time of trial. Counsel's contention on this point has no merit, for it was recently decided by this

Court that it was proper procedure for the trial judge to defer ruling on a motion to suppress interposed prior to the trial until all the evidence was heard. *Poetter vs. United States*, 31 Fed. (2) 138.

The argument in main in this brief will be divided into two points: First, that the evidence adduced at the time of the trial herein showed that the portion of the premises where the still was found was not in fact a part of the house although entered through the house, and that that portion of the premises where the still, mash and whiskey were found was used in part for business purposes which would take it out of the dwelling house catagory under Section 25 of the National Prohibition act, and that the search and seizure was therefore legal, because although the officers at the time of such search did not have evidence of sale they had probable cause to believe a crime was being committed in ther presence. Second, the officers have a right to enter any building in the day or night in their capacity of internal revenue agents to look for, inspect and examine illicit or illegal distilling operations and apparatus.

I.

Agent C. H. Griffith testified that at a point five hundred yards, and possibly more, from the house he smelled the odor of fermenting mash, and that he first went to the barn but there was nothing there. Going on around the barn, between the house and the barn, he then could strongly smell the odor of mash and could hear the kerosene burners. He stated that he heard someone running across the basement floor as he pushed the basement door in with his shoulder and that he saw, before he entered the house, a sump pit at the side of the house for the disposal of mash, and smelled the mash coming out of the pit. It was steaming mash, he stated. (Tr. 98).

He further testified (Tr.98) that the house was set upon a knoll and that there was a full concrete basement under the house, a back door and a front door; that the still house was out to one side and that the vault door lead out of the basement into a two-story still house built of concrete about eight inches thick; that the door of the still room was two feet in diameter. None of it was under the main part of the house. There was a little lean-to built out to the rear,

running along the basement steps, and this little lean-to was over the still house. Vegetables and groceries were stored on this lean-to or porch (Tr. 100). The still room was on an off-set from the house, he testified, and there was nothing over it except a lean-to porch. (Tr. 101-103).

Agent H. E. Carr testified that the wall between the basement and the still room was six inches thick, and the entrance from the still room to the basement was about two feet in diameter, and the still was about the same width. (Tr. 104). He further stated that the part called the still room was outside and protruded out from the foundation of the house (Tr. 105). He stated, also, that there was a tunnel dug under the floor of the basement to the chimney of the house, which ran the entire depth of the house, and another tunnel from the right side of the still house to a well about fifty feet distant, which was a fresh air vent.

Agent Carr further testified (Tr. 104), that in the first room in the still house was a five-hundred gallon vat of steaming mash, and the dome of the still coming up from the floor below. In another corner was a manhole leading to the room below. In this room there was another five hundred gallon vat of mash, and to

the right were two fifteen-gallon pressure tanks embedded in concrete.

It is apparent from the record herein that the portion of the house where the distilling apparatus was found, if a portion of the house at all, was used in part for business purposes. There was no entrance to the house proper from the still house except through a small aperture two feet wide. There was a thick wall between the still room and the basement of the house proper, and the door from this was only a small aperture two feet in diameter. There was in this case, therefore, evidence upon which the trial judge could find that the place where the still was found did not comprise any portion of the dwelling of Alvau at all, and that if it did constitute a part of the dwelling it was used for business purposes.

We are familar with the Bell, Temperani, and Schroeder cases, in which this Court, with Judge Gilbert dissenting, held that the mere fact that manufacture of intoxicating liquors was being carried on in a dwelling house does not render the same a place used in part for business purposes. Here, we have a situation unlike that in either the Bell, Temperani and Schroeder cases. Of course, it is believed by the writer

of this brief that Judge Gilbert's dissent is the three cases mentioned above is unanswerable, but that question is now no longer an open one.

A case on all fours with the instant case and one which was decided by this Court, is the case of *Forni vs. United States*, 3 Fed. (2d) 354, which was cited by Judge Gilbert in his dissent in the Schroeder case, and also cited later by the United States Supreme Court in the case of *Steele vs. United States*, 267 U. S. 498. In the *Forni* case, the defendant lived in the building which was searched and liquor found in the basement thereof. The officers stated in their affidavits that there was no means of ingress or egress from the basement to the other portions of the building, that they had seen the liquor in said basement or garage. It was said that it was a question for the court to decide whether or not the place searched was a dwelling or part of the same, and whether or not it was used for business purposes. The evidence was held sufficient to support a finding that the basement of the dwelling in which the defendant resided was used for business purposes and was lawfully searched, even though there was no evidence of sale.

In *Dowling vs. Collins*, 10 Fed. (2d) 62, a search of the basement of the defendant's residence was held

valid for the officers had probable cause to believe that in said basement the defendant was running and operating an office for the transaction of the business of a distillery, and the placed searched was therefore used in part for business purposes and not occupied solely as a private dwelling.

In *United States vs. Mitchell*, 12 Fed. (2d) 88, it was held that a frame lean-to built at the back of defendant's residence and attached thereto by carpentry, but having no door opening into the dwelling was not a part of the dweling house, and there would be nothing to militate against the search and seizure thereof without a warrant. In the Mitchell case the Court stated:

> "Taking up these contentions in reverse order, I cannot agree with the government upon the broad contention made by them that the mere presence of mash, whisky, and a still in a private residence deprives it of the character of a private dwelling, though these facts may, when considered with the other evidence, be sufficient to support the inference that the place is being used for the purpose of sale, or for the business of manufacture for sale. Monaghan v. U. S. (C.C.A.) 5 F. (2d) 424; In re Mobile (D.C.) 278 F. 949; U. S. v. Goodwin (D.C.) 1 F. (2d) 36-38; Temperani v. U. S. (C.C.A.) 299 F. 365.
>
> "Whether the precise facts of this case satisfy the requirements of the proof necessary to sus-

tain an issue of this kind, it is not necessary for me to decide; for I think it clear that point (b) is well taken, and, if true, the fact that children may make their beds on the ground in the mash house, like pigs in a sty, would have no efficacy to convert this place into a dwelling, any more than if the defendant let them sleep in a sty or any other of his outhouses, for it is the dominant, and not the incidental, use of a place that determines its character as a dwelling. Besides, I do not believe, though the defendant swears to it, that he lets his children sleep in such a place. I think, rather, the exigencies of his legal situation have driven his testimony too far."

In *Miller vs. United States*, 9 Fed. (2d) 382, (9th C.C.A.), it was held that where the officers saw through an open door into the dwelling of the defendant, wines and kegs, and raisins and sugar, they had visible evidence of a crime being committed in their presence and therefore no warrant was necessary. The Miller case was cited by Judge Gilbert in his dissent in the Schroeder case, and the case of Dowling vs. Collins, supra, was also cited by Judge Gilbert in his dissent in the Schroeder case.

In the case of *Koth vs. United States*, 16 Fed. (2d) 61, (9th C.C.A.), a case in which Judge Dietrich was the trial judge, it was held that the smell of intoxicating liquor emanating from a shed which was searched and which was not in a dwelling house, was

sufficient probable cause to warrant the officers making a search and seizure.

The trial judge, on the question of the competency of evidence, where the validity of the search and seizure is questioned, is the sole judge of the credibility of the witnesses and the importance or weight which he desires to give to their testimony. *Poetter vs. United States*, supra; *Marsh vs. United States*, 29 Fed. (2d) 172; *Jankowski vs. United States*, 28 Fed. (2d) 800.

The officers in the instant case smelled the odor of mash and kerosene burners before they entered the defendant's still house, and seeing a refuse or sump pit for the disposal of mash outside the house before entering the same, had probable cause to believe a crime was being committed and therefore had a right to enter and search the still house without a warrant. *Vachina vs. United States*, 283 Fed. 35; *McBride vs. United States*, 284 Fed. 416; in re *Mobile*, 278 Fed. 949; *Garske vs. United States*, 1 Fed. (2d) 620; *Steele vs. United States*, 267 U. S. 503; *Miller vs. United States*, supra.

The burden in the instant case was upon the defendants to show that the place where the distilling

operations were carried on was not used in part for business purposes. *United States vs. Goodwin* 2 Fed. (2d) 36. This burden, the trial court found, the defendants had not sustained, and it was within his province so to find, as he was the sole judge of the credibility of the witnesses, and the importance to be attached to their testimony with reference to the competency of the same. *Marsh vs. United States*, supra; *Jankowski vs. United States*, supra. The search and seizure was therefore legal.

II.

The prohibition agents, at the time they entered the appellant's house, being clothed with the powers of Internal Revenue Agents, were acting under the authority of the Internal Revenue laws. *Maryland vs. Soper*, 270 U. S. 31. The Internal Revenue statutes of the United States impose certain taxes upon distilling apparatus and breweries, manufactories and distilleries and their products and sales. They also give the right to Internal Revenue agents to enter buildings or places where distilling or brewing is carried on, and confer the right, also, to enter a building where any

such articles or objects subject to tax may be produced or kept, to examine them and to assess taxes collectible on said articles, and to invoke the statutory right given to the Government for forfeiture of any such articles on which the statutory tax is evaded. 26 U. S. C. A., Secs. 92, 193, 202, 504, 506, 509, 525. These statutes were re-enacted by the Willis-Campbell Act.

Contrary to appellant's contention, Judge Bourquin alone is not the only court which holds that Federal prohibition agents have the powers of Internal Revenue agents, and, being clothed with such powers they have the right, day or night, to enter any premises where distilling is being carried on to inspect the apparatus and location, and when engaged in such official duty, may seize articles used in unlawful liquor operations and search for the same. *United States v. Hilsinger*, 284 Fed. 586.

In *United States vs. Page*, 277 Fed. 459, it was held that Internal Revenue officers have a right to enter any distillery or premises used as such, without a search warrant, either in the daytime or night time, and that as a corollary of such right they are entitled to break into a building wherein they believe a distillery or distilling apparatus is located, at any time of

the day or night. In that case, the court speaking of Prohibition agents as Internal Revenue officers, stated:

> "Section 3376 R. S. gives the right to Revenue officers to enter a distillery without a search warrant as a matter of course and if entry be obstructed, to force entry, or break into the building, either in the daytime or night time, and this right is given in order that certain searches and seizures may be made also without search warrants. See, for instance, Section 3453 R. S. regarding seizure of certain articles. See also Section 3477 R. S. giving Revenue officers the right to enter in the daytime or night time, any building wherein the officer has reason to believe there is distilling apparatus or a distillery, without the premises being open. Such right of entry does not, by clear implication, require a search warrant, at least in the case of cigar factories, rectifying plants, distilleries and such establishments. It seems clear that he can and he should 'without a search warrant' in some instances make the search and seizure authorized by Section 3453."

There have been frequent cases of other Government inspectors and officers, such as oleomargarine inspectors, meat inspectors, bank examiners, and others who are entitled under the statutes and decisions to lawfully enter places of business and places used as such, and premises used as manufactories without the authority of any search warrant, and it is elementary that they are vested by law with summary powers. Their powers and rights are no different than

those of a Prohibition agent, who, being clothed with the powers of an Internal Revenue agent, searches a dwelling house where distilling operations are being carried on. The rights of oleomargarine inspectors, meat inspectors, national bank inspectors, etc., as stated above, in their summary powers in search and seizure cases have been upheld by the Supreme Court of the United States. *United States v. 3 tons of coal*, 28 Fed. Cas. 157; *Pittsburg Molding Co. vs. Totten*, 248 U. S. 1, 63 L. Ed. 97; *United States vs. Cudahy Packing Co.*, 243 Fed. 441.

It is respectfully submitted, in view of all the foregoing, that the judgment of the trial court should be affirmed.

Respectfully Submitted.

ANTHONY SAVAGE,
United States Attorney,

TOM DeWOLFE
Assistant United States Attorney.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 5746

FRANK ALVAU and HUMBERT ROSSI,
Appellants.

vs.

UNITED STATES OF AMERICA,
Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Honorable GEORGE M. BOURQUIN, Judge

PETITION OF APPELLEE FOR REHEARING

ANTHONY SAVAGE,
United States Attorney,

TOM DE WOLFE,
Assistant United States Attorney,

Attorneys for Appellee

Office and Postoffice Address:
310 Federal Building, Seattle, Washington.

In the

United States Circuit Court of Appeals

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No. 5746

FRANK ALVAU and HUMBERT ROSSI,
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vs.

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Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Honorable GEORGE M. BOURQUIN, Judge

PETITION OF APPELLEE FOR REHEARING

To the Judges of the Above Entitled Court:

Comes now the appellee by Anthony Savage, United States Attorney for the Western District of Washington, and Tom De Wolfe, Assistant United States Attorney for said District, and respectfully petition the court for a rehearing in the above entitled cause

and in support of their petition show to the court as follows:

QUESTIONS TO BE RAISED

The questions to be raised in this petition are as follows:

1. As to defendant Alvau the Government's contention was thoroughly argued before this court on June 12, 1929 and was thoroughly set forth in the Government's Brief which the opinion of this honorable court shows has been considered. As to the defendant Alvau, however, the government requests the court to give further consideration to the case of United States v. Page, 277 F. 459, a case from the District Court of Virginia, wherein it was held that Internal Revenue officers have a right to enter a distillery, or premises used as such, without a search warrant. either in the day time or night time and that as a corollary of such right they are entitled to break into a building wherein they believe a distillery or distilling apparatus is located, at any time of the day or night. The Government wishes also to respectfully suggest to this court that if the opinion of this court in the instant case is to stand, the purpose and object of the Statute allowing internal revenue agents to search a

still site without a warrant will necessarily have to be deviated from.

2. The greater portion of this petition will be taken up by the Government's argument with reference to the position of defendant Rossi in this case. It is our position that as Rossi was only a guest of Alvau for the evening and denied ownership and any interest in the house searched and the illicit paraphernalia seized, that he is not in a position in the instant case to assert that the search and seizure as to him was invalid, and that therefore, as to him at least, this court should affirm the judgment and sentence of the trial court.

ARGUMENT

It was stated in the opinion of this court that Rossi being temporarily domiciled in the house of Alvau as a guest, and having moved to strike the Government's evidence at the end of the Government's case, was in a position to assert the violation of his rights under the Fourth Amendment of the Constitution of the United States. Rossi testified at the time of the trial as follows:

> "On the 12th day of July, 1928, I was working for the Metropolitan Life Insurance Company. I went out there to try to revive some insurance that had been in existence with my company and

I had gone there to see them about being reinstated. I had insurance upon one of the members of the Alvau family upon which the premium was just past due, (Tr. 124); and he further testified as follows: (Tr. 125). I arrived there about 8 o'clock or so in the evening, having taken a public bus. After I stayed pretty late talking insurance. Frank (Alvau) invited me to stay all night. It was a hard case to try to sell him. I stayed all night; I went to bed and in the middle of the night heard the dogs barking; it was ten minutes or a quarter of three in the morning. It was dark and rainy. I asked Frank what was the matter and he said 'I am afraid they are burglars'. We jumped out of bed and Frank said: 'See what is wrong'. I ran for my clothes in the closet; there was a hanger there and some hooks, was the reason it fell to the floor and I couldn't find my clothes. Frank threw me a pair of overalls and I put them on. * * * I asked him where I was going to hide and he grabbed me by the hand and took me to the basement. He said: 'Here is a place for you'. We went to the wall and I heard him scratch something. He said: 'Here is a place'. I said: 'No, I can't see nothing'. I had been in the place about five hours. * * * (Tr. 126). The place in which I was located was just underneath the kitchen and the bath room. I worked for the Metropolitan Life Insurance Company after arrest for about a week or over, when I resigned because my name was in the paper in connection with this business. I have since been working in a grocery store."

On cross examination the witness Rossi further testified as follows:

(Tr. 126) "I didn't turn on the lights for the

agent—he had a flash light. I didn't know anything about the still or mash. My clothes didn't smell of mash or whiskey".

We thus see that Rossi testified that he went to Alvau's place on the evening of the 12th to sell him some insurance and did not contemplate spending the evening until late in the evening after experiencing difficulty in attempting to sell Alvau insurance, Alvau invited him to spend the evening there. And it will further be seen from his testimony that he was not even temporarily domiciled in the house but spent only a portion of the evening there as Alvau's guest and his testimony shows that immediately after the raid he went back to Seattle to renew his work with the life insurance company and that he spent only one evening with Alvau.

The testimony above quoted further shows that he asserted no interest in the still or mash and that he alleged that he had no knowledge of the existence of said articles and materials. How can it then be said that he, being temporarily domiciled in the residence of Alvau as a guest, is entitled to the benefit of his motion to strike the Government's evidence at the end of the Government's case, on the ground that the same was obtained in violation of his (Rossi's) Constitutional rights?

May we suggest to this honorable court that if the decision in the instant case as to Rossi is to be followed by the trial courts of this circuit, that it must be held by said trial courts that anyone who aids and abets another in an unlawful liquor transaction and who stays at the home of his co-defendant a few hours may, even though he denies ownership of the premises and denies any interest in the illicit articles seized, claim that the search and seizure as to him was invalid on account of the infringement and impairment of his Constitutional rights under the Fourth Amendment.

It is our position that this court, and other Federal courts, have held in many cases in which the facts were analogous with the case at bar, that a person such as Rossi, for failing to timely move to suppress the evidence and by failing to assert an interest in the premises searched or the articles seized, was thereby precluded from attacking the validity of the search of said premises and the seizure of said articles.

In MacDaniel v. United States, 294 F. 769, where it was held that one who did not timely move to suppress the evidence and who did not assert an interest in the articles alleged to have been unlawfully seized. was not in a position to claim suppression of the same as evidence, the court said, at page 771:

"Passing all questions as to the legality of the search and seizure, we agree with the view of the court below. An objection of this nature, it is well settled, is available only to the person whose premises have been unlawfully searched and whose documents have been unlawfully seized. See Remus v. United States (6 C. C. A.) 291 Fed. 501, 511; Haywood v. United States (7 C. C. A.) 268 Fed. 795, 803. In Wilson v. United States, 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558; Wheeler v. United States, 226 U. S. 478, 33 Sup. Ct. 158, 57 L. Ed. 309, and Johnson v. United States, 228 U. S. 457, 33 Sup. Ct. 572, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263, it is held that officers of a corporation may be compelled to produce corporate records and documents, even after they have succeeded to the title thereto, and that the same may be used in evidence against them on a criminal charge".

In Nielson v. United States, 24 F. (2d) 802, (9th C. C. A.), this court held that the rights of defendants having no interest in premises searched, are not invaded by the search and seizure thereof, stating on page 803 as follows:

"There being no evidence tending to connect him with the activities of the defendants or to show that he had knowledge thereof, or was associated with them in any common purpose, there could be no prejudice to their rights in denying his petition to suppress. The prohibition against unreasonable search and seizure is for the benefit of the person whose rights are invaded. The rights of the defendants here were in no way invaded by

> the search and seizure and they were in no position to demand suppression of the evidence thus obtained. Chicco v. United States, 284 F. 434; Graham v. United States, 15 F. (2d) 740; Rosenberg v. United States, 15 F. (2d) 179; Cantrell v. United States, 15 F. (2d) 953".

In Segurola v. United States, 275 U. S. 106, the Supreme Court of the United States after holding that the defendant had waived his rights to attack the search and seizure by failing to timely move for suppression of the evidence, went on to say:

> "A court when engaged in trying a criminal case will not take notice of the manner in which witnesses have possessed themselves of papers or other articles of personal property which are material and properly offered in evidence, because the court will not, in trying a criminal case, permit a collateral issue to be raised as to the source of competent evidence; to pursue it would be to halt the orderly progress of the cause and consider incidentally a question which has happened to cross the path of such litigation and which is wholly independent of it. In other words, in order to raise the question of illegal seizure and an absence of probable cause in that seizure, the defendants should have moved to have the whiskey and other liquor returned to them as their property and as not subject to seizure or use as evidence".

This court has always followed the rule laid down in the above mentioned cases, as evidenced by the following cases:

Souza v. United States, 5 F. (2d) 9 (9th C. C. A.)
Armstrong v. United States, 16 F. (2) 62 (9th C. C. A.).
Lewis v. United States, 6 F. (2d) 222, (9th C. C. A.).

In the Armstrong case, supra, this court stated:

> "Nor does the record show that the defendant made any claim, either to the premises searched or the property seized, and in the absence of such claim cannot urge unreasonable search upon which to base a constitutional right. See Lewis v. United States, 6 F. (2d) 222. The intention of Section 269, supra, as amended, is that the complaining party must show that he was denied a substantial right. Haywood v. United States, 268 F. 795; Williams v. United States, 265 F. 625. This he has done".

Along the same line and to the same effect see Goldberg v. United States, 297 F. 98. In Patterson v. United States, 31 F. (2d) 737 (9th C. C. A.), defendant Patterson was arrested while entering the portals of his lodging house after liquor had been found in a room alleged by the Government to be defendant Patterson's room. Patterson in that case did not move prior to time of trial for suppression of the evidence, and at the time of trial said that the room in which the liquor was found was his brother's room, although defendant Patterson's clothing and effects were found therein. The record in the Patterson case

shows defendant Patterson moved at the end of the Government's case for suppression of the evidence and for an Order striking the same.

As shown in the opinion of this court and the record in the Patterson case, the officers had no search warrant, there was no evidence of sale and no facts were shown which gave the officers probable cause to make the search without a warrant, but it was held by this court that Patterson, although his suitcase and effects were found in the room, was not in a position to say the search warrant was illegal because he denied ownership of the liquor and failed to timely move for the suppression of the evidence.

Certainly defendant Rossi in the instant case is in no better position to attack the search and seizure in the case at bar than was the defendant in the Patterson case.

In Rosenberg v, United States, 15 F. (2d) 179. a case often cited by this honorable court in its decisions in search and seizure cases, it was held that the defendant was precluded from attacking the seizure because he failed to assert any interest in the property seized in the still room, as he claimed to have leased the premises. The court in the Rosenberg case said:

"It is next charged that the search warrant

and return thereof were insufficient and that the evidence secured thereunder should have been excluded. The answer to this is that the defendant disclaimed any ownership or interest in the property seized in the still room, claiming to have leased the premises. The Goldberg case, 297 F. 98. holds that the defendant cannot avail himself of the illegality of the search of a place with which he had no connection or the seizure of property in which he claims no interest. See also Chicco v. United States, 284 F. 434. None of the liquor found was on the part of the premises occupied by the defendant as living quarters. The jury found on the other counts that it was not his and defendant's counsel in his opening stated that it was unknown to defendant and he had nothing to do with it".

So in the case at bar Rossi cannot be said to have asserted an interest in the premises searched or the articles seized merely because after talking with Alvau with reference to the sale of some insurance policies, it became late and he decided to spend the evening as Alvau's guest. He is certainly in no better position to attack the validity of the search in this case than were the defendants in the Rosenberg and Patterson cases, supra. It will be remembered by this court that at the argument of this case June 12th, counsel for defendant Rossi stated practically in substance that inasmuch as the record did not show a timely motion to suppress by Rossi or an assertion of any interest by him in the ar-

ticles seized, that he could not predicate error on the court's refusal to strike the testimony, but that his main and particular grievance was the unfair and prejudicial instructions of the trial court.

However, at this time as was done at the time of argument in this case, Government counsel respectfully call to this court's attention the fact that no exceptions were saved by defendant's counsel to said instructions. (Tr. 143).

In view of all the foregoing, it is respectfully submitted that a rehearing should be granted in the instant case.

Respectfully submitted,

ANTHONY SAVAGE,
United States Attorney.

TOM DE WOLFE,
Assistant United States Attorney

CERTIFICATE

It is hereby certified that in our judgment the foregoing petition for rehearing is well founded and that it is not interposed for delay.

Dated at Seattle, Washington, this 10 day of July, 1929.

ANTHONY SAVAGE,
United States Attorney,

TOM DE WOLFE,
Assistant United States Attorney.

Attorneys for Appellee.

Office and Postoffice Address:
310 Federal Building, Seattle, Washington.

No. 5747

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

ALEX KUSNIERZ,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

The Filmer Bros. Electrotype Co., San Francisco—3—18—29—50

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

ANTHONY SAVAGE, Esquire, Attorney for Appellant,
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W. G. BEARDSLEE, Esquire, Attorney for Appellee,
1523 L. C. Smith Bldg., Seattle, Washington.

GRAHAM K. BETTS, Esquire, Attorney for Appellee,
1523 L. C. Smith Bldg., Seattle, Washington. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 11,787.

ALEX KUSNIERZ,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

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*Page-number appearing at the foot of page of original certified Transcript of Record.

COMPLAINT.

The plaintiff complains of the defendant and for cause of action alleges:

I.

That on or about the 3d day of October, 1917, the plaintiff enlisted for military service with the United States Army and was honorably discharged therefrom with a surgeon's certificate of disability on or about the 10th day of October, 1918, and is now a resident of Earlington, Washington.

II.

That in or about the month of November, 1917, desiring to be insured against the risks of war, the plaintiff applied for a policy of war risk insurance in the sum of $10,000.00 and thereafter there was deducted monthly from his pay the sum of $6.10, as premium for said insurance and there was issued to him by the defendant a policy of war risk insurance in the sum of $10,000.00 by the terms whereof the defendant agreed to pay the plaintiff the sum of $57.50 per month in the event he suffered a permanent disability of such a nature as would render it impossible for him to follow continuously a substantially gainful occupation while said policy was kept in effect by said payment of premiums.

III.

That on or about the 24th day of December, 1917, the Camp Lewis-Tacoma Stage in which the plaintiff was at that time riding violently collided with another car, injuring the plaintiff severely about the head and body; that about thirty days there-

after [2] the plaintiff was obliged to undergo an operation for a goitre, which was immediately followed by an attack of pleural pneumonia and influenza; that while suffering from said attacks the plaintiff developed mastoid infection, hyper-thyroid of an extremely serious and permanent nature. That thereafter, and during the remainder of said military service, the plaintiff was obliged to spend the greater portion of his time in army hospitals, developing a permanent condition of neurasthenia and a permanent intermittent numbness of the right side of his head; that by reason of the foregoing the plaintiff was discharged as aforesaid totally and permanently disabled from following continuously any substantially gainful occupation, by reason whereof there became due and owing him from the defendant, the sum of $57.50 per month, commencing on said date of *date of* disability.

IV.

That the plaintiff made due proof of said total and permanent disability and made due and timely demand for the payment of said sums but that the defendant has disagreed with the plaintiff as to his claim and disability and has refused and still refuses to pay said amounts or any part thereof.

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of $5,980.00, together with his costs and disbursements herein.

W. G. BEARDSLEE and
S. B. BASSETT,
Attorneys for Plaintiff. [3]

State of Washington,
County of King,—ss.

Alex Kusnierz, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, knows the contents thereof, and believes the same to be true.

ALEX KUSNIERZ.

Subscribed and sworn to before me this 20th day of May, 1927.

[Seal] SAMUEL B. BASSETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Jul. 18, 1927. [4]

[Title of Court and Cause.]

ANSWER.

Comes now the United States of America, defendant above named, by Thos. P. Revelle, United States Attorney for the Western District of Washington, and Anthony Savage, Assistant United States Attorney for said District, and for answer to the plaintiff's complaint admits, denies, and alleges as follows:

I.

Denies each and every allegation contained in Paragraph I of plaintiff's complaint.

II.

Admits the allegations contained in Paragraph II of the plaintiff's complaint.

III.

Denies each and every allegation contained in Paragraph III of the plaintiff's complaint.

IV.

Denies each and every allegation contained in Paragraph IV of the plaintiff's complaint, except that it admits that a disagreement exists between the plaintiff and defendant, entitling the plaintiff to bring this action on his War Risk Insurance Policy. [5]

For further answer and affirmative defense, defendant alleges as follows:

I.

That according to the allegations of the complaint, the War Risk Insurance Policy matured and the present cause of action accrued on December 24, 1918; that the complaint was filed on July 18, 1927; that therefore this action was not instituted within the time fixed by law.

II.

That effective January 1, 1920, plaintiff converted Five Thousand Dollars of his Term Insurance to an Ordinary Life Policy, on which premiums were paid to include December, 1922. Effective January 1, 1923, the plan of insurance was changed from Ordinary Life to a Twenty-Year Endowment Policy, on which premiums were paid to include December, 1927. On conversion of the

Five Thousand Dollars Term Insurance no reference was made to the remaining Five Thousand Dollars, and therefore no premiums were paid thereon and therefore this portion of the insurance lapsed for nonpayment of premium due January 1, 1920. That by reason of the conversion from Term Insurance to Ordinary Life Policy effective January 1, 1920, plaintiff represented that he was not totally and permanently disabled prior to that date. That plaintiff is, therefore, estopped to assert that he became totally and permanently disabled prior to January 1, 1920.

WHEREFORE, having fully answered defendant prays it may go hence without day and recover its costs and disbursements [6] herein.

THOS. P. REVELLE,
THOS. P. REVELLE,
United States Attorney.
ANTHONY SAVAGE.
ANTHONY SAVAGE,
Assistant United States Attorney. [7]

United States of America,
Western District of Washington,
Northern Division.

Anthony Savage, being first duly sworn, on oath deposes and says: That he is an Assistant United States Attorney for the Western District of Washington, Northern Division, and as such makes this verification for and on behalf of the United States of America.

That he has read the foregoing answer, knows

the contents thereof, and believes the same to be true.

ANTHONY SAVAGE.

Subscribed and sworn to before me this —— day of December, 1927.

[Seal] T. W. EGGER,

Deputy Clerk, United States District Court, Western District of Washington.

Received a copy of the within answer this 2d day of Dec., 1928.

BEARDSLEE & BASSETT,
Attorney for Pltff.

[Endorsed]: Filed Dec. 2, 1927. [8]

[Title of Court and Cause.]

REPLY.

Comes now the plaintiff above named and by way of reply to defendant's affirmative defense, admits, denies and alleges as follows:

I.

In reply to Paragraph I of defendant's affirmative defense, plaintiff admits that the policy of war risk insurance matured on the 24th day of December, 1918, and that the complaint was filed on July 18th, 1927, but denies each and every other allegation therein contained and affirms the fact to be that no disagreement was effected with the defendant giving this court jurisdiction until within

the six years immediate preceding the commencement of this action.

II.

For reply to Paragraph II of said affirmative defense, the defendant admits that certain conversions and reinstatements were made *by, alleges* that such conversions and reinstatements were made solely upon the representation of said defendant; that said conversions and reinstatements were necessary in order to protect the plaintiff on his policy of war risk insurance, and on the further representation that his conversions and reinstatements would in no way effect the recovery of his original policy of war risk insurance; defendant denies each and every other allegation and thing contained in said paragraph.

BEARDSLEE & BASSETT,
Attorneys for Plaintiff. [9]

United States of America,
Western District of Washington,
Northern Division,—ss.

Alex Kusnierz, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true.

ALEX KUSNIERZ.

Subscribed and sworn to before me this 7th day of February, 1928.

[Seal] SAMUEL B. BASSETT,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received copy of within reply and admit service thereof this 15 day of February, 1928.

ANTHONY SAVAGE,
Attorney for Defendant.

[Endorsed]: Filed Feb. 15, 1928. [10]

[Title of Court and Cause.]

VERDICT.

We, the jury in the above-entitled cause, find for the plaintiff and fix the date of his total and permanent disability as from Oct. 10, 1918.

O. J. C. DUTTON,
Foreman.

[Endorsed]: Filed Oct. 23, 1928. [11]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 11,787.

ALEX KUSNIERZ,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT.

The above-entitled cause having come duly on

for trial on the 19th day of October, 1928, before the Honorable Jeremiah Neterer, one of the Judges of the above-entitled court, the plaintiff appearing in person and by his attorney, W. G. Beardslee, the defendant, United States of America, appearing by Anthony Savage, United States District Attorney, and Tom DeWolfe, Assistant United States District Attorney, and C. L. Dawson, Special Counsel for the United States Veterans Bureau, a jury having been duly impaneled and sworn to try said cause, and after having duly considered the evidence produced by both parties, and having on the 23d day of October, 1928, returned a verdict in favor of the plaintiff to the effect that he became totally and permanently disabled on the 10th day of October, 1918, on which date his policy of war risk insurance was in full force and effect, and in consequence whereof, the plaintiff became entitled to receive from the defendant the sum of $57.50 per month commencing on the 10th day of October, 1918, the defendant's motion for new trial having been duly presented, considered and overruled, now therefore,—

IT IS ORDERED, ADJUDGED AND DECREED that the [12] plaintiff recover from the defendant the sum of $6,900.00, that being the amount due on the $10,000.00 policy of war risk insurance at the rate of $57.50 per month commencing on the 10th day of October, 1918, and continuing until the 10th day of October, 1928, said payments to be made as by law in such cases provided.

IT IS FURTHER ORDERED that W. G.

Beardslee is entitled to receive from said judgment as a reasonable attorney's fee for his services in the above-entitled cause the sum of $690.00, that being ten per cent of said $6,900.00, and that he is entitled to receive the further sum of ten per cent of each and every other payment hereinafter made by the defendant to the plaintiff, his heirs, executors and assigns, in consequence of or as the result of the entrance of this judgment, said payments to be made as by law in such cases provided, AND IT IS SO DECREED.

Done in open court this 14 day of November, 1928.

JEREMIAH NETERER,
Judge.

O. K. as to form.

LESTER E. POPE,
Assistant U. S. Attorney.

Copy received this —— day of November, 1928.

———.

[Endorsed]: Filed Nov. 14, 1928. [13]

[Title of Court and Cause.]

PETITION FOR NEW TRIAL.

Comes now the defendant, the United States of America, by Anthony Savage, United States Attorney for the Western District of Washington, and Tom DeWolfe, Assistant United States Attorney for the said District, and Lester E. Pope, Regional Attorney for the United States Veterans'

Bureau, and petitions the Court for an order granting a new trial in the above-entitled cause for the following reasons, to wit:

I.

Error in law occurring at the trial and duly excepted to by the defendant.

II.

Insufficiency of the evidence to justify the verdict.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, United States Veterans' Bureau.

Received a copy of the within petition this 31 day of Oct., 1928.

W. G. BEARDSLEE,
Attorney for Pltff.

[Endorsed]: Filed Nov. 1, 1928. [14]

[Title of Court and Cause.]

HEARING ON DEFENDANT'S PETITION FOR NEW TRIAL AND ORDER EXTENDING TIME THIRTY DAYS FOR LODGING BILL OF EXCEPTIONS.

Now, on this 5th day of November, 1928, W. G. Beardslee, Esq., appearing as counsel for the plain-

tiff, and Jeffrey Heiman, Assistant United States Attorney, appearing for the defendant, this cause comes on for hearing on defendant's petition for new trial which is submitted without argument. The motion is denied and an exception is noted. Upon motion of the United States Attorney the term is ordered extended thirty days for bill of exceptions.

Journal No. 16, at page 404. [15]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Alex Kusnierz, Plaintiff, and Beardslee & Bassett, Attorneys for Said Plaintiff:

You, and each of *t*ou, will please take notice that the United States of America, defendant in the above-entitled cause, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, decree and order entered in the above-entitled cause on the 14th day of November, 1928, and that the certified copy of transcript will be filed in the said Appellate Court within thirty days from the filing of this notice.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, United States Veterans' Bureau.

Received a copy of the within notice this 8th day of Feb., 1929.

W. G. BEARDSLEE,
Attorney for Pltff.

[Endorsed]: Filed Feb. 11, 1929. [16]

[Title of Court and Cause.]

PETITION FOR APPEAL.

The above-named defendant, feeling itself aggrieved by the order, judgment, and decree made and entered in this cause on the 14th day of November, 1928, does hereby appeal from the said order, judgment and decree in each and every part thereof to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors herein, and said defendant prays that its appeal be allowed and citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said order, judgment and decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, as by the rules of said Court in such cases made and provided.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, United States Veterans Bureau.

Received a copy of the within petition this 8 day of Feb., 1929.

W. G. BEARDSLEE,
Atty. for Pltff.

[Endorsed]: Filed Feb. 11, 1929. [17]

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS.

Comes now the United States of America, defendant in the above-entitled action, by Anthony Savage, United States Attorney for the Western District of Washington, Tom DeWolfe, Assistant United States Attorney for said District, Northern Division, and Lester E. Pope, Regional Attorney for the United States Veterans Bureau, and in connection with its notice of appeal herein and petition for appeal herein, assigns the following errors which it avers occurred at the trial of said case, which were duly excepted to by it, and upon which it relies to reverse the judgment herein.

I.

The District Court erred in denying the defendant's motion for a directed verdict at the close of the plaintiff's case, which motion for directed verdict was interposed on the following grounds:

The evidence is wholly insufficient to sustain the allegations of the complaint in that no medical evidence or other evidence was adduced which shows that the condition of the plaintiff was permanent prior to at least 1924 and all of the evidence thereof

shows he was not totally disabled from the date of his discharge from the service or the date alleged in the complaint; and on the further grounds that: [18]

The plaintiff, effective on January 1st, 1920, effected a conversion of $5,000 of his term insurance into an ordinary life insurance contract and that by reason thereof the plaintiff is estopped from asserting permanent total disability prior to the date of such conversion; and thereafter he is not entitled to recovery upon the original term insurance contract;

To which denial the defendant took a separate exception to each ground, at the time of the trial herein.

II.

The District Court erred in denying the defendant's motion for a directed verdict at the close of the entire testimony, which motion for directed verdict was interposed on the same grounds as the defendant's motion for a directed verdict at the end of the plaintiff's case;

To which denial the defendant took separate exception to each ground, at the time of the trial herein.

III.

The District Court erred in refusing to give Defendant's Requested Instruction No. 7, which requested instruction was as follows:

> "You are instructed further that if you find for the plaintiff he is not entitled to recover except upon five thousand dollars of War Risk

term insurance for the reason that it is undisputed that effective January 1st, 1920, the plaintiff converted five thousand dollars term insurance to an Ordinary Life Government converted policy and that such conversion constituted a merger and novation of five thousand dollars of the term insurance originally [19] applied for by the plaintiff. The plaintiff has not brought suit upon this converted contract of insurance and therefore is not entitled to any rights or benefits thereunder."

IV.

The District Court erred in denying the defendant's petition for a new trial.

V.

The District Court erred in entering judgment upon the verdict herein, when the evidence adduced at the trial of this action was insufficient to sustain the verdict or the judgment.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans Bureau.

Received a copy of the within assignment this 8th day of Feb., 1929.

W. G. BEARDSLEE,
Attorney for Pltff.

[Endorsed]: Filed Feb. 11, 1929. [20]

[Title of Court and Cause.]

ORDER ALLOWING APPEAL.

On the application of the defendant herein

IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment heretofore entered and filed herein on the 14th day of November, 1928, be and the same is hereby allowed.

IT IS FURTHER ORDERED that a certified transcript of the record, testimony, exhibits, stipulations and all proceedings be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

Done in open court this 11th day of February, 1929.

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within order this 8th day of Feb., 1929.

W. G. BEARDSLEE,
Attorney for Pltff.

[Endorsed]: Filed Feb. 11, 1929. [21]

[Title of Court and Cause.]

ORDER ALLOWING SIXTY DAYS IN WHICH TO LODGE BILL OF EXCEPTIONS.

(Excerpt from Trial Record of Oct. 23, 1928.)

* * * Defendant asks and is granted sixty days in which to lodge its proposed bill of exceptions.

Journal No. 16, at page 378. [22]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO AND INCLUDING FEBRUARY 20, 1929, FOR LODGING BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED by and between attorney for the plaintiff herein, and Anthony Savage, United States Attorney for the Western District of Washington, Tom DeWolfe, Assistant United States Attorney for the same District, Northern Division, and Lester E. Pope, Regional Attorney for the United States Veterans Bureau, attorneys for the defendant, that the defendant may have up to and including Feb. 20, 1929, within which to lodge its bill of exceptions herein.

Dated this 4 day of Feb. 1929.

W. G. BEARDSLEE,
Attorney for Plaintiff.
ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney, U. S. Veterans Bureau.

Received a copy of the within stipulation this 2d day of Feb., 1929.

W. G. BEARDSLEE,
Attorney for Pltff.

[Endorsed]: Filed Feb. 4, 1929. [23]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO FEBRUARY 20, 1929, TO LODGE BILL OF EXCEPTIONS.

Now on this 4th day of February, 1929, on oral motion of Tom DeWolfe, Assistant United States Attorney, and written stipulation filed, time in which to lodge bill of exceptions is ordered extended to February 20, 1929.

Journal No. 16, at page 606. [24]

[Title of Court and Cause.]

ORDER FIXING DATE FOR SETTLING BILL OF EXCEPTIONS.

Now on this 18th day of February, 1929, Tom DeWolfe, Assistant United States Attorney, appearing for the plaintiff, IT IS HEREBY ORDERED that the date for settling bill of exceptions, be, and the same is set for February 25, 1929.

Journal No. 16, at page 634. [25]

[Title of Court and Cause.]

DEFENDANT'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 19th day of October, 1928, at the hour of two o'clock P. M., the above-entitled and numbered cause came on regularly for trial before the Honorable Jeremiah Neterer, one of the Judges of the United States District Court, sitting in the above-entitled court at Seattle, in the Western District of Washington, Northern Division,

W. G. Beardslee and Graham K. Betts appearing for the plaintiff, and Anthony Savage, United States Attorney for the Western District of Washington, and Tom DeWolfe, Assistant United States Attorney, for the same District, Northern Division, and Lester E. Pope, Regional Attorney for the United States Veterans' Bureau, and C. L. Dawson,

(Testimony of Thomas E. Henehan.)

trial attorney for the United States Veterans' Bureau, appearing for the defendant.

Whereupon the following proceedings were had: A jury was duly impaneled and sworn to try this case, and W. G. Beardslee made an opening statement to the jury for the plaintiff and C. L. Dawson made an opening statement to the jury for the defendant. [26]

TESTIMONY OF THOMAS E. HENEHAN, FOR PLAINTIFF.

THOMAS H. HENEHAN, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. BETTS.)

My name is Thomas E. Henehan. Prior to 1920 I was Superintendent of the Seattle Frog & Switch Company located at Renton with offices in Seattle. I know the plaintiff in this case. I knew him in 1918. He worked for me at the Seattle Frog & Switch Company. He did general work around the shop, running the drill, press, riveting, assembling, etc. I do not recall what part of 1918 that was. You would have to get that from the firm's records. You would not call that either light or heavy work. It would be medium. I could not say positively but the first time I think he worked around about a month. The first time he returned to work—about a month—was 1918. I think it was 1918 or beginning of 1919. Right after the war. Right

(Testimony of Thomas E. Henehan.)

after his discharge. He worked for me again after that—about two weeks after. I gave him a lighter job sharpening tools, drills. I could not say I noticed anything about his physical condition at that time. The job in the tool-room was not a very active one. He ground them on an emery-wheel. I could not say how long he worked at that job. You would have to see the firm records. I think it was more than a month. Possibly two months or longer. I do not know what he was paid. I could not say whether he was paid as much as the other men. I gave him the lighter job in the tool-room because he complained about the other work being too heavy for him. [27]

The witness THOMAS E. HENEHAN testified further as follows on

Cross-examination.

(By Mr. DAWSON.)

I am Superintendent of the Seattle Frog & Switch Company and judge we had between 10 and 12 men employed at that time. I had direct supervision over the men and over the plaintiff. When I was there I saw the plaintiff at his work. I was there mostly every day. When he first came to work he was riveting, assembling frogs and switches and such like work. He would have to do a little lifting and riveting required quite a little effort. He would have to use a hammer and in drilling use an air-gun. The hammer is 3 or 4 pounds; a gun is 12 or 15. He could have a support on his knee

(Testimony of Thomas E. Henehan.)

in handling the gun—it all depends on the position he is riveting in. He was a very good riveter. His work was satisfactory. I don't recall the wages paid at that time. He was steady on the job, 8 hours a day. That was the regular hours for all our employees. The second job I gave him was sharpening tools, such as planer tools and drills on the grinding stone or an emery-wheel, dressing up tools and in shape for the machines. As a general rule the machinist gave his attention to the tools. He worked on that job possibly a month or two, three months, maybe longer. I don't recall. He worked 8 hours a day. His work was satisfactory. I could not tell the exact duration of time he worked. He may have worked 32 weeks in the year 1919.

The witness THOMAS E. HENEHAN testified as follows on

Redirect Examination.

(By Mr. BETTS.)

He did not explain why he quit the first job at the time, not until later on when he got the second position. [28]

TESTIMONY OF JOHN KUSNIERZ, FOR PLAINTIFF.

JOHN KUSNIERZ, a witness called on behalf of the plaintiff herein, being first duly sworn, testified as follows on

(Testimony of John Kusnierz.)

Direct Examination.

(By Mr. BETTS.)

My name is John Kusnierz. I am a brother to the plaintiff. Alex was home in 1918. He came home when he was discharged. He lived at my house last fall. He looked rather pale. He felt tired and didn't do any work. I worked with him at the Seattle Frog & Switch Co. I saw him work there. I cannot remember how he performed his work there. He did not do as much work as I did. I don't think he did as much work as the other men did. It was light work he did. I don't remember how much he got paid but it was less than I got. I don't remember how long he worked there. He did very little work around our home. He sprinkled the garden, chopped wood. Not any heavy wood. Just kindling. He quit the job at the Switch & Frog Company because he complained that his chest was swollen that (indicating) big. He stayed home then. He did not do much just walked around and stayed outside. He walked quite a bit. I don't remember how long he worked on the second job there. He got some kind of easy work. After he quit the second job he laid around the yard. After he was in the hospital he came back to live at my house again. I think it was in 1922. He was about the same I guess. He lived at our house all the time till last fall—then he moved out. I don't know if his condition changed up to the time he left my house.

(Testimony of John Kusnierz.)

The witness JOHN KUSNIERZ testified further as follows on

Cross-examination.

(By Mr. DAWSON.)

My brother is not working at the present time. He is not living at my house now. When he lived with me he [29] didn't do but very little work around the house. He sprinkled the garden, that is all. I worked at the Seattle Frog & Switch Company while my brother worked there. He was not doing the same kind of work as I. I was doing machine work. He put in full 8 hours a day. I don't know how long he worked there. He worked quite a while in 1918 and 1919.

TESTIMONY OF MRS. JOHN KUSNIERZ, FOR PLAINTIFF.

Mrs. JOHN KUSNIERZ, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. BETTS.)

My name is Mrs. John Kusnierz. I am a sister-in-law to the plaintiff. Alex came home when he was discharged. He was very nervous and he looked sick. I don't remember how long he stayed at home before he went to work. About a year, or 6 months. I could not tell you. He did not do much around the house. Chopped some wood and

(Testimony of Mrs. John Kusnierz.)

sprinkled the garden just light work. He chopped just small blocks. After he came home from work at the Seattle Frog & Switch Company he had supper and went to bed. I think he was tired. He was nervous. He did not look very good after he quit the work the first time he worked. He looked like a sick man. He was not very much different while he was working the second time. After he came home from Bremerton he did not look like he was sick. He was discharged from Bremerton. He could not do the work. I don't remember when that was.

The witness Mrs. JOHN KUSNIERZ further testified as follows on

Cross-examination.

(By Mr. DAWSON.)

I did not see him while he was working. I stayed at home. He did not work in the garden after he came home from work. I noticed he was a little nervous. [30]

TESTIMONY OF DR. E. F. RISTINE, FOR PLAINTIFF.

Dr. E. F. RISTINE, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. BEARDSLEE.)

I am Dr. E. F. Ristine. I graduated from

(Testimony of Dr. E. F. Ristine.)

Northwestern in 1910 and have had 3 years' experience in the City Hospital, Rochester, Minnesota. I know the plaintiff, Alex Kusnierz, and have had occasion to examine him. I started the examination on Kusnierz the 18th of October, this year, and have had him more or less under my observation every day or every other day until yesterday. My final diagnosis was pulmonitis, an inflammatory condition of the lungs; cause not found. That is, I don't know whether it was tuberculosis or infection of pneumonia, or what. He has myocarditis, an inflammation of the muscle of the heart. He has a mitral lesion, systolic murmur of the heart. He has a forced tremor which I classify as neurasthenia, in lack of other causes. I think there is no definite reason why we classify it as neurasthenia unless there is a nervous condition we can find a reason for. I thought here the central nervous system was diseased but I could not find absolute causes; beyond a question he is nervous under any condition you might take him. It is my personal belief that nervous people are sick people, yet without an accepted fact or theory or disease, it is not always so accepted by the general public. Spinal puncture shows negative. If he had a cord tumor or inflammatory condition, we would have an increase in the cell count. We would have, probably, a little sugar—which were negative in this case. We had a Wasserman reaction on the blood and it was negative. The spinal puncture and Wasserman test did not show any venereal disease of any

(Testimony of Dr. E. F. Ristine.)

type. [31] When a man is operated on for goitre or the thyroid gland a portion is removed because there has been too much secretion of the gland. In his case, he is not now secreting as much as he would —only a little amount less than normal and as close as the average operation would come to being correct. It would be hard for me to say to what extent this condition I found in him would disable him because I haven't seen him long enough. I think he is a sick man and if he were under my care and recommendation, I would recommend that he be taken in the hospital and worked out to see what could be done with the case rather than put him on the public to make a living at this time. I would say some of these conditions are permanent, but as to the degree of disability—they might make some improvement—I don't know what it might ultimately end up in. He is not fit to be employed to-day. As far as to-day is concerned, he is totally disabled.

The witness Dr. E. F. RISTINE further testified as follows on

Cross-examination.

(By Mr. DAWSON.)

I do not know whether this man was totally and permanently disabled back in 1918. I would say, in so far as the answer to the question is concerned, he was, but I did not know the man and did not know anything about him. I would classify neurasthenia as a highly technical name for nervousness or for

(Testimony of Dr. E. F. Ristine.)

that which we do not specifically give a reason for but it is an entity. I would not say it is a functional disease. Personally, it is my belief these are not functional, but we classify them, ordinarily, as functional. I have treated many persons with myocarditis and mitral lesions, and they were following gainful occupations. [32] I would not want to state to this jury as to the degree of this man's disability prior to the time I examined him.

TESTIMONY OF DR. DONALD V. TRUEBLOOD, FOR PLAINTIFF.

Dr. DONALD V. TRUEBLOOD, a witness called on behalf of the plaintiff herein, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. BEARDSLEE.)

My name is Dr. Donald V. Trueblood. I am a physician and surgeon licensed to practice in the State of Washington. I received my preliminary education at John Hopkins Medical School and have practiced here since 1917. For some time I was with Eagleson Clinic. I know the plaintiff, Alex Kusnierz. He first came under my attention when referred to me by Dr. Wilt, who was associated with me at the Clinic in 1926. I examined him at that time. He complained of dizziness, headache and nervousness and I came to the conclusion that he had a disease of the labyrinth, that is, the semi-circular canal connected with the middle ear. That

(Testimony of Dr. Donald V. Trueblood.)

is that part of the apparatus that aids us in keeping our balance. It is the same apparatus that is disturbed when one has seasickness aboard ship, and when this apparatus is damaged by disease or accident, dizziness and vertigo and headache are usually the symptoms, and that is about all I found. The area is called the labyrinth. That is not the name of the disease—I was not able to specify the type of disease causing this trouble, but the internal ear was disturbed. He said when he stooped over to do something he would be dizzy and that he could not work because of it. Our findings bore out that statement. In certain positions we placed him, he said he was dizzy. We [33] could not determine definitely except in the Rhomberg test—to have a man look at the ceiling—which shows the labyrinth or some other similar structure is not functioning to produce equilibrium—they sway and often fall, and his test proved that. That is the only definite test I could determine it by. A patient would have to be pretty well trained to deceive me in that particular test. With the disability found and believed to be existing, as disclosed by the Rhomberg test, I do not believe he would be capable of following a substantially gainful occupation. I saw him again last March and his symptoms were the same. He said he was worse. Of course that statement was his. I put him through that particular test again and it was about the same. It is hard to say whether that condition is going to be permanent or not. It has

(Testimony of Dr. E. F. Ristine.)

that which we do not specifically give a reason for but it is an entity. I would not say it is a functional disease. Personally, it is my belief these are not functional, but we classify them, ordinarily, as functional. I have treated many persons with myocarditis and mitral lesions, and they were following gainful occupations. [32] I would not want to state to this jury as to the degree of this man's disability prior to the time I examined him.

TESTIMONY OF DR. DONALD V. TRUEBLOOD, FOR PLAINTIFF.

Dr. DONALD V. TRUEBLOOD, a witness called on behalf of the plaintiff herein, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. BEARDSLEE.)

My name is Dr. Donald V. Trueblood. I am a physician and surgeon licensed to practice in the State of Washington. I received my preliminary education at John Hopkins Medical School and have practiced here since 1917. For some time I was with Eagleson Clinic. I know the plaintiff, Alex Kusnierz. He first came under my attention when referred to me by Dr. Wilt, who was associated with me at the Clinic in 1926. I examined him at that time. He complained of dizziness, headache and nervousness and I came to the conclusion that he had a disease of the labyrinth, that is, the semicircular canal connected with the middle ear. That

(Testimony of Dr. Donald V. Trueblood.)

is that part of the apparatus that aids us in keeping our balance. It is the same apparatus that is disturbed when one has seasickness aboard ship, and when this apparatus is damaged by disease or accident, dizziness and vertigo and headache are usually the symptoms, and that is about all I found. The area is called the labyrinth. That is not the name of the disease—I was not able to specify the type of disease causing this trouble, but the internal ear was disturbed. He said when he stooped over to do something he would be dizzy, and that he could not work because of it. Our findings bore out that statement. In certain positions we placed him, he said he was dizzy. We [33] could not determine definitely except in the Rhomberg test—to have a man look at the ceiling—which shows the labyrinth or some other similar structure is not functioning to produce equilibrium—they sway and often fall, and his test proved that. That is the only definite test I could determine it by. A patient would have to be pretty well trained to deceive me in that particular test. With the disability found and believed to be existing, as disclosed by the Rhomberg test, I do not believe he would be capable of following a substantially gainful occupation. I saw him again last March and his symptoms were the same. He said he was worse. Of course that statement was his. I put him through that particular test again and it was about the same. It is hard to say whether that condition is going to be permanent or not. It has

(Testimony of Dr. Donald V. Trueblood.)

lasted all these years and it certainly is chronic. An "acute" condition is one that comes suddenly and disappears within short periods of time. A "chronic" condition is one which recurs repeatedly or is continuous. I could not say "permanent." Sometimes these conditions clear up. I doubt if it is going to clear up but one cannot be sure. I think it is reasonable to presume that it will continue. I don't know whether he was given a Wasserman test through our office or not. I don't believe I had a Wasserman report on him in my record.

The witness DONALD V. TRUEBLOOD further testified as follows on

Cross-examination.

(By Mr. DAWSON.)

That is the only disability I found in my examination of him. I am not an eye, ear, nose and throat specialist. It is true that many men are dizzy when they stoop over. I don't think weight has much to do with it. I have had a [34] number of patients who have had dizziness but usually we were able to find the cause. My diagnosis was made from the history and examination. If the history given by the plaintiff is not correct the diagnosis is not correct, with the exception of the physical examination. We have to make use of the patient's history in determining a diagnosis. I did

(Testimony of Dr. Frank T. Wilt.)
not know this man before I examined him in 1926. I would not want to state as to the degree of his disability prior to my examination.

TESTIMONY OF DR. FRANK T. WILT, FOR PLAINTIFF.

Dr. FRANK T. WILT, a witness called on behalf of the plaintiff herein, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. BEARDSLEE.)

My name is Dr. Frank T. Wilt. I am a physician and have been practicing since 1909. I received my preliminary education at Cooper Medical College of Stanford University, California. I have been licensed to practice in this state since 1909. I have specialized in mental and nervous diseases. I have seen this plaintiff several times. According to my history of the examinations and treatments of this plaintiff, I first saw him November 6th, 1924. At that time he gave a history of having been well and strong up until he entered the service. As to previous diseases and injuries he stated that in December, 1917, he had an automobile accident, was knocked unconscious, was at the Base Hospital, in Camp Lewis—had an abscess in the right ear. That was history. My diagnosis was traumatic neurosis, resulting from an injury. Possibly hyperthyroidism. In such cases usually they are very upset emotionally; there is considerable tremor, the

(Testimony of Dr. Frank T. Wilt.)

hands perspire, they may have a very rapid heart —emotionally they are very easily upset. Hyper-thyroidism may [35] come up from a number of things. At that time he had an affection of the right ear. Hyper-thyroidism is not necessarily a mental disability or traceable or connected with neurasthenia in any way, although a mental condition may enter with hyper-thyroidism.

At this time, upon order of the Court, and without objection on the part of the defendant, the plaintiff's complaint was amended by the insertion of the word "hyper-thyroidism" after the words "mastoid infection."

I cannot tell just what effect this hyper-thyroidism and also the neurasthenia would have upon the plaintiff as to limiting his ability to work or engage in mental activity or any kind of employment. Generally it would render him incapable of sustained work. If I could tell about the patient as I found him, with his history, I might be able to bring out just how it would affect him. He would be tired all the time. He would have different bodily sensations. He would have fears—many fears—the emotions would be unstable; he would be mentally confused, unable to concentrate; it is according to the degree. In mild cases, they can get along nicely; in other cases it becomes so profound it is helpless. I believe he is totally incompetent. I cannot tell what caused this condition. I felt at the time I referred him to Dr. Trueblood that there was some organic trouble that was

(Testimony of Dr. Frank T. Wilt.)

causing his nervous condition. That injury to his head or possibly this hyper-thyroid*ion*. Traumatic neurasthenia means an injury. It is very essential to my work to take a man's history to determine the source of the disability in my professional opinion. My impression and diagnosis of this man's condition were that it was first caused from [36] that injury in the automobile accident. I believe that would totally incapacitate him and that the condition is permanent.

The witness Dr. FRANK T. WILT further testified as follows on

Cross-examination.

(By Mr. DAWSON.)

I think it has been permanent ever since I have known him. I would say he is totally disabled from following a gainful occupation at this time. It is true that many men with hyper-thyroidism are working every day. There is a marked difference between hyper-thyroidism and neurasthenia. I would not want to state as to the degree of his disability prior to the time I examined him. In order to reach the diagnosis we must consider the history of the case and must assume that the statements are true.

TESTIMONY OF ALEX KUSNIERZ, IN HIS OWN BEHALF.

ALEX KUSNIERZ, the plaintiff herein, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. BEARDSLEE.)

My name is Alex Kusnierz and the plaintiff in this case. I am over 40 years old. I live near Renton Junction.

It is admitted the plaintiff enlisted on the 3d of October, 1917, and was honorably discharged on the 10th of October, 1918, and that he took out a policy of War Risk Insurance in November, 1917.

On December 24, 1917, I was in the Tacoma-Camp Lewis stage wreck. I was unconscious for awhile. They took me to company quarters and I was confined for three days. After three days I went on duty and in a week I reported sick—nervous, ailing, and I was bruised and sore and tired and a sharp pain went up my right leg to my head. [37] About a month later I went to the Base Hospital. I don't know what for. The next day they operated on me. I was in the hospital from January 21st or 22d until the spring. I went on hospital furlough. I was in the hospital several months. They operated on my neck. Following the operation I had pneumonia. I think I was in the hospital several months before I went on furlough and then I went home to my brother's

(Testimony of Alex Kusnierz.)

place. When I went back to camp after my furlough and went on training duty—for about a week and then I reported sick. I stayed on duty and in about a week reported sick again. They they sent me to the Base Hospital—three weeks or a month. I don't remember how long I was on duty that time and then I went back to the Base Hospital again after I was taken from the 91st Division to the Depot Brigade. I was in the hospital two or three months and then I was discharged. My chest swelled up, raised and every step I made caused pain. That was after I got back the first time after the operation, after I had the pneumonia. I went home after I was discharged. I was at my brother's for awhile and then I went to work for Mr. Henehan, either the last part of 1918 or early part of 1919. If I remember right I think I worked there about a month. I had trouble with my chest and nervousness and trouble to sleep. I knew the work was too heavy for me. I could not sleep. They I stayed home awhile and then I went back to work for Mr. Henehan and did lighter work, for maybe three or four months. Mr. Henehan helped me quite a bit with my work. I took care of the tools, sharpening them, getting them ready for work. A new foreman put me on heavier work and I got sick right quick. I had nervousness, headache and in my [38] chest. It was too heavy that is why I quit. Then I didn't work for a month or two and then I went to a school for returned soldiers. I was

(Testimony of Alex Kusnierz.)

poor there. Not very good. I did not go every day. Sometimes I stayed at home. I tried to go every day. I was there over a year. Then I went to a hospital—to the United States Veterans' Hospital at Tacoma—and was there over 3 years—3½ years. I was in the hospital that long. I was taking treatment, but no operations. I believe I had my tonsils taken out. For a time I was better. Then it was the same. I would be better for a week or two. I was out of service and working for the Switch & Frog Company and I was in the Renton hospital several times—Dr. Bronston. He is in Renton. And at Bremerton Dr. Smythe and Dr. Scott. I was sent to them by the Vocational Board man in charge there. After I was discharged I went to Eagleson's. I don't remember how long after I got out of the hospital. I did not feel better after I got out of the hospital. A week or two after I got out of the hospital I went to Dr. Eagleson's clinic. My discharge is at home.

The witness ALEX KUSNIERZ further testified as follows on

Cross-examination.

(By Mr. DAWSON.)

I came out of the hospital in November, 1926. I have been in two or three times for examinations since. I have only been examined by representatives of the Veterans' Bureau since that time. When I was called I would go up to the Veterans' Bureau for an examination. I went to work for

(Testimony of Alex Kusnierz.)

the Seattle Frog & Switch Co., the latter part of 1918 or the early part of 1919. It might be that I worked part of 1918 and part of 1919. Some days I did not work while I worked for the Switch & Frog Co., the company paid me for. [39] While I was in service I was in the hospital for this operation on my neck and I had the pneumonia. As far as I know I got well from the pneumonia. For the Seattle Frog & Switch Company I was doing part machine work and part sanding frogs and switches. I was required to handle hammers and some riveting work. I don't remember what kind of riveting work. I put in 8 hours a day. I was paid $5.00 a day. I don't remember how many weeks I worked. The next job they gave me was taking care of the tools; sharpening drills and dressing them and keeping them ready to go to work. Part of the time I was able to do that work. I got sick and the new foreman put me back on the heavy work and I quit. I could work at the light work all right. I was weak at times while I did the light work and had to go and take a rest. I entered vocational training for about a year or a year and four months in the fall of 1919. I was in the drawing-room being trained as a mechanic. After the drafting room I went to the tool-room learning the names of the different tools and instruments. I would hand the tool when it was called for. Towards the last I did some of the work a machinist is supposed to do. I used some of the machines that were there. That was re-

(Testimony of Alex Kusnierz.)

quired as part of my training. I had to do so much of it every week. I put in 8 hours a day while I was going to school, but not very regular. I missed some days. After I got out of the school I was sent to the hospital. Since I got out of the hospital in 1926 I have been at home at my brother's. I am not married. I don't live with my brother now. I live at Renton Junction. I have some garden out there. I work around the house a little. I do a little in the [40] garden. I have 2 acres but I hire the work done. I water the garden and around the house myself. During the day I go about on the place. Part of the time I live on that place. I have 3 rabbits and a dog. I am required to stay in bed during the daytime nearly every day. After I got out of the service I paid premiums on my insurance until I stopped training.

Mr. BEARDSLEE.—I will stipulate your records are right.

Mr. DAWSON.—It is agreed by and between the parties hereto that the plaintiff on December 1st, 1917, applied for and was granted War Risk Insurance in the amount of $10,000, War Risk Term Insurance; that during the time the said plaintiff was in military service, premiums were deducted from the service pay and that thereafter the premiums were paid on the said $10,000 term insurance to December, 1919; that, effective January 1st, 1920, the plaintiff converted and merged $5,000 of the term insurance to an ordinary life insurance converted policy, on which premiums were paid to in-

(Testimony of Alex Kusnierz.)

clude December, 1922; that effective January 1st, 1923, the plan of insurance was changed from an ordinary life insurance converted policy to a 20-year endowment converted policy on which premiums were paid to include December, 1927; and it is further agreed that the United States Veterans' Bureau has loaned on the said converted insurance contract, the 20-year endowment Government policy, the sum of $300.00 on November 15th, 1927, and the further sum of $1300.00 under date of December 31st, 1927, both of which said loans are unpaid, together with the interest thereon at the legal rate. It is further agreed that the $5,000 term insurance which [41] was not converted lapsed for failure to pay the premium due January 1st, 1920, and was not in force or effect thereafter.

Mr. BEARDSLEE.—It was not stipulated that the policy lapsed that day, but merely ceased payments on that day.

Q. I hand you Government's Exhibit "A–1" and ask you to look at that and tell me if that is your signature right down here. A. Yes.

Q. And did you receive from the United States Veterans' Bureau a check for $300.00 as a loan on your insurance contract? A. Yes.

Q. I hand you Government's Exhibit "A–2" and ask you to look at that and see if that is your signature. A. Yes.

Q. And did you receive from the United States Veterans' Bureau the sum of $1300 as a loan on your insurance contract?

(Testimony of Alex Kusnierz.)

A. It was $1,000 the second time and both together is $1,300.

Mr. BEARDSLEE.—That stipulation may be changed to that.

Mr. DAWSON.—I want to look at my records to see if that is true.

The witness further testified as follows on

Redirect Examination.

It is my understanding that I borrowed $1,000 one time and $300 the next time—altogether $1,300.00. I paid $199.75 premiums a year since 1920.

Q. Have you receipts for that?

A. Witness takes paper from his pocket. [42]

Q. How did you happen to convert your insurance?

Mr. DAWSON.—Objected to as immaterial.

Mr. BEARDSLEE.—I was offering it for this reason—an attempt to show that the law provided and all of us ex-service men were advised shortly after our return that we must, under the law, convert our policy within a certain time after discharge and if we didn't, we could no longer carry term insurance and that was the information he received on printed folders sent out by the Government and Bureau and he converted this under that understanding that he convert it or otherwise lose the advantage of the insurance.

Mr. DAWSON.—The statute has been amended from time to time, permitting conversions to be made.

(Testimony of Alex Kusnierz.)

The COURT.—He did that pursuant to the provision of the law?

Mr. DAWSON.—He got an entirely different contract.

The COURT.—No question about that.

Q. State how you happened to convert your insurance.

A. I was told that the time was nearly up to have it converted so I had it converted.

A. And was it, or not, your understanding that unless you converted it you would lose advantage of your insurance?

Mr. DAWSON.—I object to that as incompetent, irrelevant and immaterial. The fact is he converted it and got a better contract than he had before.

The COURT.—That is not a matter that is before the court now. He had to convert or lose the benefit of the contract which he got; isn't that right?

Mr. DAWSON.—No, indeed.

The COURT.—In order to get the benefits of the contract which he received? [43]

Mr. DAWSON.—No, indeed; we have term contracts which are in force to-day.

The COURT.—He could not get this contract unless he converted it?

Mr. DAWSON.—No.

Q. Handing you Plaintiff's Exhibit No. 1 for identification I will ask you if that is one of the folders given you at the time of your conversion or approximately thereto? A. Yes.

(Testimony of Alex Kusnierz.)

Whereupon plaintiff's exhibit was offered in evidence and objected to by the defendant as incompetent, irrelevant and immaterial and not binding upon the defendant in this action, the Court reserving the right to admit same later.

WITNESS.—(Continuing.) Besides being examined by Dr. Bronston, Dr. Wilt, Dr. Trueblood and the Veterans' Bureau and Army doctors, prior to 1927, I was examined by Dr. Smythe and Dr. Scott in Bremerton.

Plaintiff rests.

Whereupon the Government moved for a directed verdict for the following reasons:

Upon the ground the evidence is wholly insufficient to sustain the allegations of the complaint in that no medical evidence or other evidence was adduced which shows that the condition of the plaintiff was permanent prior to at least 1924 and all of the evidence thereof shows he was not totally disabled from the date of his discharge from the service or the date alleged in the complaint; and

On the further grounds that the plaintiff, effective on January 1st, 1920, effected a conversion of $5,000 of his term insurance into an ordinary life insurance contract and that by reason thereof the plaintiff [44] is estopped from asserting permanent total disability prior to the date of such conversion; and thereafter he is not entitled to recovery upon the original term insurance contract; which motion was denied by the Court as follows:

The COURT.—The motion of the defendant in this case must in all respects be denied. The Court must find upon the equitable defense that the plaintiff with knowledge of his rights and status under the war risk insurance policy and law, did not waive any right under the war risk insurance, and that the conversion of a part of the policy was done without any legal advice and pursuant to circular received by him from the agency of the defendant, calling his attention to the fact that the time when the change could be made was about to expire and that prompt action should be taken, and that this was taken without any legal advice or knowledge of his legal status with relation to the policy or a conviction on his part that his disability was total and permanent within the intent and purview of the policy and law. If the plaintiff was at the time totally and permanently disabled within the intent and purview of the law under which the war risk insurance policy was issued, and such disability was reasonably certain to continue throughout his life, then the policy matured and he would not be bound by the conversion thereafter, and the payments made to him were voluntary payments made to him by the Veterans' Bureau, and for which the defendant will be entitled to credit, if it is concluded as a fact by the jury, which is the sole judge, that there was total and permanent disability and reasonable certainty of its continuance throughout life. It follows [45] that the equitable defense is therefore determined by the Court against the contention of

the defendant; to which denial the defendant took exception.

Whereupon the defendant requested permission to recall the plaintiff, Alex Kusnierz, for further cross-examination, which was refused; to which refusal the defendant took exception.

Whereupon the defendant submitted to the Court its written requested instructions, which requested instructions were as follows:

REQUESTED INSTRUCTION No. 1.

The subject matter of this suit is a contract of yearly renewable term insurance in the amount of ten thousand dollars, payable in monthly installments of $57.50, each in the event that Alex Kusnierz, who is the insured, became permanently and totally disabled on and after the issuance of said contract of insurance, and before September 10, 1918.

REQUESTED INSTRUCTION No. 2.

The words permanent and total disability may be any impairment of mind or body which renders it impossible for the one so afflicted to engage in any gainful occupation continuously. You are charged that the word "continuously" as used in this definition that I have given you means without interruption or unbroken and must be given a reasonable interpretation; for instance, it does not mean that a man must work night and day, Sundays and holidays and week days. It merely means that if he holds a position continuously for a substantial

period of time, he is [46] continuously employed. It must be given a common-sense construction. It does not mean that one must be employed every minute of his time to bring himself within this provision. A spasmodic or periodic interruption in employment or the ability to be employed is not enough if you believe that the man was able to carry on or did carry on a substantially gainful occupation in a reasonably and substantially *gainful occupation in a reasonably and substantially* continuous manner. You are further instructed that if the interruption in employment is caused by the progress of the disease, then and in that event such interruption must not be taken as evidence that the man was totally and permanently disabled prior to the time that such progress or aggravation of the condition occurred. It is a question of fact for your determination of whether at any time since the contract of insurance in this case expired for failure to pay the premium the plaintiff was able to or did carry on a substantially gainful occupation in a substantially continuous manner.

REQUESTED INSTRUCTION No. 3.

If you find that the plaintiff worked for the Seattle Frog & Switch Company in the years 1918 and 1919 at a salary ranging from $5 to $6 per day, and that his work was satisfactory to the company, you are instructed that that would be engaging in a substantially gainful occupation continuously, and if he did this he was not permanently and totally disabled. [47]

REQUESTED INSTRUCTION No. 4.

The Court also charges you that the fact that the Government gave the plaintiff vocational training and paid him a salary while taking such schooling must not be considered as evidence of the plaintiff's permanent and total disability. The opportunity of such vocational training was offered to ex-service men who were not permanently and totally disabled.

REQUESTED INSTRUCTION No. 5.

The plaintiff is not entitled to recover anything under this contract of insurance if he was only partially disabled during the life of the insurance contract or has been only partially disabled at any time subsequent to that date even though the disability or disabilities of the insured person be deemed and considered by you to be permanent in character.

REQUESTED INSTRUCTION No. 6.

If you find by fair preponderance of the evidence that the plaintiff was not in such condition of mind or body as would render it reasonably certain during the life of the insurance contract that he was then totally disabled and would continue to be so totally disabled throughout the remainder of his lifetime, then and in that event your verdict should be for the defendant.

REQUESTED INSTRUCTION No. 7.

You are instructed further that if you find for the plaintiff he is not entitled to recover except upon five thousand dollars of War Risk term insurance

(Testimony of U. M. Henehan.)

for the reason [48] that it is undisputed that effective January 1st, 1920, the plaintiff converted five thousand dollars term insurance to an ordinary life Government converted policy and that such conversion constituted a merger and novation of five thousand dollars of the term insurance originally applied for by the plaintiff. The plaintiff has not brought suit upon this converted contract of insurance and therefore is not entitled to any rights or benefits thereunder.

End of requested instructions.

TESTIMONY OF U. M. HENEHAN, FOR DEFENDANT.

U. M. HENEHAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination.

(By Mr. DAWSON.)

My name is U. M. Henehan. I am office manager of the Seattle Frog & Switch Company and in such position I have charge of the records and time-books of the company. I have with me the records and time-books relating to the employment of Alex Kusnierz, the plaintiff in this case during the years 1918 and 1919. The records show that he was employed during 1917, after that just during 1918— After September, 1918, after he returned from the military service. He started October 26, 1918. He continued working all through the year

(Testimony of U. M. Henehan.)

1918 from October—he had broken weeks. He started the week of October 26th, and he worked for five days at the rate of five dollars a day—$25.00. The week of November 2d, 1918, he worked six days—$30.00; the week of November 9th, he worked one day—$5.00; the week of November 23d, he worked 4 days—$20.00; the week of November 14th, 1918, he did not work. The week of November 30th, 1918, he worked 4 days—$20.00. The week [49] of December 7th, 1918, 5 days—$25.00; the week of December 14th, 1918, he got $43.80. Some overtime in that week; the week of December 21st, 6 days—$30.00; the week of December 28th—5 days—$25.00; the week of January 3d, 1919, 5 days—$25.00; the week of January 10, 1919, 5 days—$25.00; the week of January 18, 1919—6 days, $30.00—that was the week of January 18, 1919. The week of January 25, 1919, 5 days $25.00; the week of January 31st, 1919, 6 days—$30.00; the week of February 7, 1919, 6 days—$30.00; the week of February 14, 1919, 6 days $30.00; the week of February 21st, 1919, 6 days—$30.00; the week of February 28, 1919, 5 days—$25.00; the week of March 7, 6 days—$30.00; the week of March 14, 1919, $21.25; the week of March 21st, 5 days—$25.00; the week of March 28th, 1919—$40.00; the week of April 4th, 1919, 6 days, $30.00; the week of April 11, 5 days—$25.00; the week of April 18th, 6 days—$30.00; the week of April 25, 6 days—$30.00; the week of May 2d, 6 days—$30.00; the week, May 9th, 6 days—$30.00; the week of May 16th—6 days, $30.00; the

(Testimony of U. M. Henehan.)
week of May 23d, 6 days—$30.00; the week of May 30th, 5 days—$25.00; the week of June 6th, 5 days—$25.00; the week of June 13, 6 days—$30.00; the week of June 20th—$28.00; the week of June 27th—6 days—$30.00; the week of July 4th, 5 days—$25.00; the week of July 12th, 1919—5 days—$25.00—the week of July 19th, $5.00. That was the end of his time.

The witness U. P. HENEHAN further testified as follows on

Cross-examination.

(By Mr. BEARDSLEE.)

There is no way of telling from the records when he went on the lighter work; there is just the amount paid and [50] the time worked. It is pretty hard to tell from the records whether or not he was getting less pay than the men doing the same kind of work; it takes the foreman of the shop to tell that; he knows what the men are doing; I don't know whether he was shifted to lighter work; I was not there at that time; I am not the same Mr. Henehan who testified yesterday.

TESTIMONY OF DR. ADOLPH BRONSON, FOR DEFENDANT.

Dr. ADOLPH BRONSON, called as a witness on behalf of the defendant, testified as follows, being first duly sworn, on

Direct Examination.

My name is Adolph Bronson; I am a physician and surgeon and have been practicing 23 years; I am licensed to practice in the State of Washington; am located at Renton, where I have lived and been engaged in my profession for 22 years. As I remember it, I examined the plaintiff, Alex Kusnierz, in 1919. Referring to Defendant's Exhibit "A–3" marked for identification, I will state that it is a report of a physical examination made by me of the plaintiff on April 16, 1919, at my office in Renton. I found enlargement of the heart; I treated him on February 15, 1919, for inflammation of the right ear; I saw him three or four times. The right ear drum cleared up under treatment at the end of two weeks. He had an enlarged heart. The drift of this report is that he had an enlarged heart and that I estimated his disability as one-third off. I believe at the time that he was able to do light work. Not heavy work. Light work that did not require any lifting I considered him able to do. At that time I found no anemia—the anemia condition was entirely cleared up. [51]

(Testimony of Dr. Adolph Bronson.)

The witness Dr. ADOLPH BRONSON further testified as follows on

Cross-examination.

(By Mr. BEARDSLEE.)

The date of the examination is on the top of that exhibit—1919. I examined him after that for life insurance—I believe once or twice for the New York Life Insurance Company but I have not the report here. I don't believe I made a subsequent examination and report that in my opinion he was totally and permanently disabled; I don't believe I wrote a letter to that effect; I have no recollection as to any total and permanent disability statement.

The witness Dr. ADOLPH BRONSON further testified as follows on

Redirect Examination.

I am not connected with the Government in any capacity.

TESTIMONY OF DR. A. D. TOLLEFSEN, FOR DEFENDANT.

Dr. A. D. TOLLEFSEN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination.

My name is D. A. Tollefsen. I graduated from the Northwestern University Medical School in 1910 and have specialized in diseases of the chest

(Testimony of Dr. A. D. Tollefsen.)

since the war; have been with the United States Veterans Bureau since 1922. I examined Mr. Alex Kusnierz; I made one heart examination in February, 1925, and my diagnosis was no cardiac pathology. In tests in examinations of the heart we take the blood pressure. We take the respiration lying down, the pulse rate after standing, and the pulse rate in a state of repose, and after standing on one leg, and we take the blood pressure again [52] and check the respiration. Myocarditis is established on many things. There is a relative increase in the area of cardiac action—that means there must be some enlargement of the heart—there is the feeble and weak pulse—there is an unnatural sequence in the heart beat. It may even be missed, or may have extra beats which would be interposed between the regular beats—the person has a tendency to sudden collapse—a cardiac spasm—on account of the weakness of the heart muscles. A checking up of the lungs and the necessary difficulty in breathing and the wheezing that goes with it. There is enlargement and dilatation of the left ventricle due to the fact that muscles are weaker and the involvement—any one of these findings do not sustain myocarditis—every nitral or systolic murmur does not mean that the heart is organically affected. From my examination of the plaintiff I found no cardiac pathology and no heart pathology—by that I mean no demonstrable affection of the valves—no demonstrable inflammation of the heart muscles—in

(Testimony of Dr. A. D. Tollefsen.)

other words, the heart is in a normal condition and the heart is measured by the capacity of the heart muscles. From the condition of the plaintiff's heart then there was no reason why he should not have been following some gainful occupation.

The witness Dr. A. D. TOLLEFSEN, further testified, as follows on

Cross-examination.

I had nothing to say about his mental condition—his traumatic nerosis. [53]

TESTIMONY OF DR. A. C. FEAMAN, FOR DEFENDANT.

Dr. A. C. FEAMAN, called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination.

My name is Albert C. Feaman. I am a physician and have practiced for over ten years. I have specialized in the diseases of the lungs and heart since 1919. I examined the plaintiff in this case on May 21, 1928; I made a pulmonary examination and a cardiac examination—examination of the heart and lungs—by cardiac I mean the heart and pulmonary the lungs. The lungs I found "negative"—there was no evidence of any lung pathology. The heart condition showed no evidence of any heart disease. From my examination made at that time I found nothing from a heart and

(Testimony of Dr. A. C. Feaman.)

lung standpoint that would prevent him from following some substantially gainful occupation.

The witness Dr. A. C. FEAMAN further testified as follows on

Cross-examination.

I answer from the standpoint of his heart and lungs.

TESTIMONY OF DR. I. A. DIX, FOR DEFENDANT.

Dr. I. A. DIX, being called as a witness for the defendant, being first duly sworn, testified as follows on

Direct Examination.

My name is I. A. Dix. I am a physician employed by the United States Veterans Bureau, since 1921. I have specialized in diseases of the heart and lungs. I examined Alex Kusnierz only on May 21, 1928—a general physical examination at the Veterans' Bureau—that is the only examination I recall. From the general physical examination I found I referred him to the specialist for examination of the ears and heart, as I was then doing the routine examination. [54] The condition I found was flat feet, bilateral, second degree, with no objective symptoms that would be disabling. From the examination I made I would not say that he was in such a condition of disability that he could not follow some substantially gainful occupation.

(Testimony of Dr. I. A. Dix.)

The witness, Dr. I. A. DIX further testified as follows on

Cross-examination.

I did not make any examination as to traumatic neurosis. I referred him to the neurologist. I referred him to a specialist.

TESTIMONY OF DR. WILLIAM E. JOINER, FOR DEFENDANT.

Dr. WILLIAM E. JOINER, being called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination.

My name is William E. Joiner. I am a physician and have been for 21 years. I am a graduate of Colgate University, New York. I specialize in the eye, ear, nose and throat, and have ever since entering medicine. At the present time I am employed by the United States Veterans' Bureau. In that employment I examined Alex Kusnierz several times. My first examination was on November 3d for eye only. There was nothing wrong with his eyes then. November 3d, 1919, was the first time I examined him for the eyes only. On March 1st, 1920, I examined the ears. The plaintiff then complained about noises in the right ear and he stated to me that he had had acute tinnitus media while serving in the army. By that I mean inflammation of the ear. It came on suddenly. He

(Testimony of Dr. William E. Joiner.)

stated the ear was punctured at that time. That would be an acute abscess. [55] When I examined him in November, 1920, I made an examination for tinnitus media and found some disturbance in the circulation. I next examined him on December 30, 1920, and found everything normal at that time. He complained of tinnitus and noises in the right ear. February 23, 1921, I examined him again, with the same results—both as to eyes and ears. He still complained of tinnitus—hearing was normal. Tinnitus is ringing or buzzing or noises in the ear. It may even be a roaring noise. It is a subjective symptom. We have to take the patient's complaint for that. I next examined him on February 17, 1923, and the ears and hearing was normal all the way through in all tests. On November 23, 1923, I again examined him and his ears and hearing were normal. He still complained of tinnitus. I last examined him on May 21, 1928. The test was normal except on the watch test. He still complained of the ringing in his ears.

The witness Dr. WILLIAM E. JOINER testified further as follows on

Cross-examination.

I examined him only for the eyes and ears. I made no neurological examination.

(Testimony of Dr. William E. Joiner.)

The witness further testified as follows on

Redirect Examination.

I found no evidence of any canal condition in my examinations. [56]

TESTIMONY OF DR. A. J. O'LEARY, FOR DEFENDANT.

Dr. A. J. O'LEARY, called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination.

My name is Austin J. O'Leary. I am a physician and surgeon and have practiced since 1905—I specialize in nervous and mental diseases. I examined the plaintiff in June, 1928, at the regional office of the United States Veterans Bureau. I made a diagnosis of neurasthenic syndrome—that means a group of symptoms which are ordinarily called neurasthenia. He was very dull—apparently slowed up somewhat mentally. The only symptoms I could make out were a marked tremor of the hands with closed eyelids. Hands and feet were cold and moist. The reflexes were exaggerated. He was *py*ersensitive. If you touched his skin he would react very rapidly. Those symptoms we call a neurasthenic syndrome and make a picture of what is known as neurasthenia. I would not say it is neurasthenia proper. It is a group of symptoms ordinarily called neurasthenia—I would consider it this neurasthenic syndrome was

(Testimony of Dr. A. J. O'Leary.)

probably secondary to a toxic goitre for which he had been previously operated on. I would not say that from his condition as I found it when I examined him he could not follow some sort of a substantially gainful employment. I would say he could follow some light occupation.

The witness Dr. O'LEARY further testified as follows on

Cross-examination.

I would say from what I found when I examined him that he could have followed some light occupation. The undependability of men afflicted with what we call [57] neurasthenia would depend upon the degree. At the time of the diagnosis I mentioned it was moderate in degree. The permanency of that condition can only be told by the history of the particular case. I think one of the greatest factors in this condition in the plaintiff was the result of the goitre operation. The element of trauma or injury might have been to some extent one of the factors also. As near as I can tell, at the time I examined him the disease was functional. There was no evidence of pathology. I felt that the goitre caused to a great extent this condition and was the biggest factor of the functional disability which he exhibited at the time. That is merely an opinion. I don't recall the date the history showed as the origin of the goitre. I recall that there had been an operation for goitre several years previously and if that caused the neurasthenia then the source of the infection had been

(Testimony of Dr. A. J. O'Leary.)

of several—11 years' standing. You can only tell whether a disease is permanent by the history of it. I would not say that the fact that this history went back 11 years made this more likely to be permanent. Sometimes those conditions clear up. There are more elements than the trauma to be considered—organic conditions. This condition may continue another 11 years and it may not. It may become better, or become worse. It is more desirable to get a life history all the way through to determine the extent of a neurasthenic disability. I would not say it is necessary to observe him. I believe by examination you could almost determine how he would react to work. You could almost determine how he would react. He might react differently to some work than to others. I could not state positively from my examination [58] what the reaction would be. He might start any kind of employment and from a condition of neurasthenia fly all to pieces.

The witness, Dr. O'LEARY, further testified as follows on

Redirect Examination.

I have examined a great many neurasthenic patients. Some are working in gainful occupations. Neurasthenia may or may not be a permanent and total disability. Neurasthenia is a nervous condition, of course.

(Testimony of Dr. A. J. O'Leary.)

The witness, Dr. O'LEARY, further testified as follows on

Recross-examination.

I believe the nervous system is one of the most important parts of the body. The very fact that you call it neurasthenia means that there is a certain group of symptoms. Therefore they all present the same symptoms and we call it neurasthenic syndrome or neurasthenia. I didn't determine this definitely as neurasthenia. I wouldn't say it is imaginary.

TESTIMONY OF DR. G. O. IRELAND, FOR DEFENDANT.

Dr. G. O. IRELAND, called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination.

My name is G. O. Ireland. I am and have been a physician for 25 years. I have paid most attention to *neoro-psychintry*—to nervous and mental diseases. I am employed by the United States Veterans' Bureau, located now at the Veterans' Hospital at American Lake. I know the plaintiff in this case. I examined him, as it shows from the records, on October 24, 1923. I did not [59] examine him for physical findings. It was for nervous and mental diseases. I found his station and gait were normal. The field test was normal.

(Testimony of Dr. G. O. Ireland.)

Co-ordination of finger to finger and finger to nose, and knee to heel were all normal. He had rather a marked intention tremor constant. His muscle tone is not too good. His general sense of touch is normal over the entire skin, chin normal, upper extremities normal, patella normal, no Rhomberg noted. In testing for the Rhomberg, the patient stands with his knees and his heels together and the toes together, hands to his side and eyes closed. If there is any organic condition present he will sway from side to side, or backwards and forwards. He cannot stand erect and maintain his position. I gave the plaintiff this test and there was no abnormal station. That indicates that there was no organic condition present. I mean by that—something that is not due to a purely psychological impulse, some destruction of tissue or pathological condition, some change or irritation of an orga*nin* the brain. That would mean there was no organic disease present as far as his brain is concerned. There is a marked dermography. No organic lesion of the nerves or nervous system. The patient had a thyroidectomy, and shows the effect of his former hypo-thyroidism. Thyroidectormy means that the thyroid gland was operated on and a part of it removed. The thyroid refers to the goitre condition. From his history he stated his memory had been poor since service—some emotions or hallucinations evident—no disorders of judgment noted at the time—sweating more than normal—diagnosis — neurocirculatory nuerasthenia. Irri-

(Testimony of Dr. G. O. Ireland.)

tation of the semi-circular canal could not help but show itself in the Rhomberg test—dizziness would not [60] necessarily manifest itself. He did not complain of dizziness at the time. I think in his general complaint he did. My conclusion of that mental test was that there was no psychosos present, and from the evidence in the neorological test, there was a neurasthenia present. There certainly was no organic condition, but a neurasthenia. I know Kusnierz well—he was not in my ward, but in another ward and talked and visited with him frequently. He was interested in the culture of canaries and had, I believe, an aviary at Cushman. I would not say from my examination and observation of him that he could not follow a gainful occupation.

The witness, Dr. G. O. IRELAND, further testified as follows on

Cross-examination.

I was at Cushman hospital from the 4th of July, 1923, until the 19th of August, 1924—I thought, all that time, that he could follow a gainful occupation. You must know that when I say "gainful" occupation for him I do not mean one that would be a gainful occupation for me. I doubt if I could get along on what he could make, but according to his own information he was sending money home to Poland, therefore, I think his occupation was to a certain extent gainful. His general complaint was that he was having headaches all the time, mostly on

(Testimony of Dr. G. O. Ireland.)

the right side—we did not find that evidence—that was substantially his complaint. He complained of ripping pains in his left side—not all the time, but nearly every day if he moved fast. There was no suggestion that he was simulating, it is quite possible he was sincere, and yet those may not really have existed. They may have been the product of his imagination and in such cases if a man is not suffering from [61] some organic condition or disability and goes to work it takes his mind off himself and the pain disappears. In such cases as this I think that is always true. It is a functional condition. If he goes to work and the pain does not disappear I would not assume that it is actual, but perhaps the work is not agreeable. Coarse tremors on the fingers indicate that there is some condition which interferes with keeping his fingers or certain parts of his body steady when he attempts to use them. That may be due to a toxic condition, such as the old goitre condition. I think my findings here showed that it referred to the old goitre condition. By the muscle tone not being good, I mean, broadly speaking, that it is flabby and soft, when he gives you a grip—not hearty. That is possibly indicative of the character of the muscle tone. The abnormal sweating might be due to various conditions. In this case I don't think it was due to any organic condition. It was probably functional. He was probably overwrought. It was a critical examination at the time on which depended considerable and I don't doubt the patient

(Testimony of Dr. G. O. Ireland.)

was upset more or less and sweat more than usual. Dermography refers to a condition of the skin where, when you apply pressure to a point on the skin with a stilletto, the mark shows red and round like a wheel on the surface of the skin. He had a poor*t* idea of dates and more difficulty remembering recent dates than those more remote. That might be due to the fact that his condition dated somewhat recently—from the time of war—and his attention was somewhat off the idea of dates. Recent dates would necessarily bring up for him all his trouble and the easiest thing to do was to dispose of the dates and not refer to them. [62] My diagnosis was neuro-circulatory neurasthenia—prognosis, guarded. He may have a pro*h*nosis that is favorable, guarded or unfavorable. "Guarded" is a term for the examiner who does not want to commit himself to say that the man has an absolutely favorable diagnosis. In that particular case I think the term "guarded" referred in my mind to the factor of what kind of outcome he had in his occupation, and that sort of thing. We don't use the word "probably" in our diagnosis, so we use the word "guarded." He was not under my direct observation. I cannot tell how many examinations I made while I was there—very often. By neuro-circulatory neurasthenia I mean—the syndrome wherein the patient finds himself—short of breath; sweats easily — headaches somewhat; complains of considerable pain over the heart, which is not confirmed by any organic disease of the

(Testimony of Dr. G. O. Ireland.)

heart,—neuro-circulatory neurasthenia is a lowering down of the general tone of circulation due to some disfunction of the nervous system controlling circulation. Sleeping sickness is an organic disease. Neuro-circulatory neurasthenia is not necessarily permanent. It is functional. It is a functional condition. There is no evidence in that diagnosis that it had existed for more than 11 years. It was a diagnosis made at that moment. I don't know that it had existed for 11 years. I don't know how long a history of neurasthenia he had. A functional disorder in my opinion is capable of cure by proper environment. I did not consider his neurasthenia due to infection, necessarily. Toxic neurasthenia may be due to an infection and had a part in his condition, not all. [63]

TESTIMONY OF VALENTINE WICZOREK, FOR DEFENDANT.

VALENTINE WICZOREK, called as a witness for the defendant, being first duly sworn, testified as follows on

Direct Examination.

My name is Valentine Wiczorek and I live at Tukwila. I know the plaintiff. I had business dealings with him in 1927. We started in raising shrubbery for future sale. Our agreement was this. I had the property and was not using it. I was working. I told him if he was interested he could use the property, so we put up a greenhouse. I

(Testimony of Valentine Wiczorek.)

built it at that time. He helped some. It is 10 by 30. We went out and got cuttings—in the neighborhood of 30,000. He helped to make cuttings and to put some in. He put in over half of them. Approximately 10,000. We were associated about 6 months, then he went out and bought a place. I gave him about 10,000 cuttings in the division. I have not been to his place. I don't know whether he set them out. While we were associated I saw him every day he was on the place—he was not there every day. Maybe two or three weeks he stayed there, and then he went away for a week or two. I don't know why. He wouldn't give me any cause or anything else. He helped to do some work constructing the greenhouse. It took him a little better than two months to put out the 10,000 cuttings. He quit because I wouldn't have him in my partnership.

The witness, VALENTINE WICZOREK, further testified as follows on

Cross-examination.

In the work in the greenhouse, my wife did my part and he did his. He did his share of the work. He wasn't very much help at the time. I didn't feel he was a very good worker. He wouldn't stay home and stay on the job. I [64] don't know where he would go. He was there more than I because I was working every day. The arrangement we had was he could use the place a couple of years until he could get stock and rustle for him-

(Testimony of Valentine Wiczorek.)
self, but my wife had to do the greatest part of the work. As far as I could see my wife and I did the great part of the work. I have no hard feelings but I wouldn't have him as a partner. Not because he wouldn't work, but personally as well as finances.

The witness VALENTINE WICZOREK, testified further as follows on

Redirect Examination.

I didn't notice anything in his physical condition why he couldn't work, but he had some kind of a belt that he used to take to bed and he made complaint if it wasn't for that belt he could not get around.

TESTIMONY OF ERNEST MAYER, FOR DEFENDANT.

ERNEST MAYER, called as a witness on behalf of the defendant, testified as follows on being first duly sworn, on

Direct Examination.

My name is Ernest Mayer. I live near Renton and have for about nine years. I know Alex Kusnierz, the plaintiff. I have known him about a year and a half to two years. I am in the florist business. In 1926 I had business dealings with him. He asked if he could stick around a few days at a time to learn a little more about the florist business—how to make cuttings and would like, when possible, to do some light work. I showed

(Testimony of Ernest Mayer.)

him how to make cuttings, how to insert them, how the work was done. He sometimes put in two days a week, sometimes one and sometimes I didn't see him for two or three or four weeks. He would come sometimes at 11 o'clock and sometimes at 9. He got cuttings from me. [65] From fifteen to twenty thousand. He set them out on my property. He worked possibly two days, and then laid up one, and then worked off and on for a period of three weeks.

The witness ERNEST MAYER, further testified as follows on

Cross-examination.

He set out camelias and roses. About 15,000 to 20,000 roses and about six or seven hundred camelias. Sometimes a day at a time, sometimes only a few hours spent setting them out.

TESTIMONY OF FRED NELSON, FOR DEFENDANT.

FRED NELSON, called as a witness for the defendant, being first duly sworn, testified as follows on

Direct Examination.

My name is Fred Nelson. I live near Renton Junction and have lived there 40 years. I know the plaintiff, Alex Kusnierz, and have about one year. I had business dealings with him in 1927. I sold him 2 acres of land about halfway between Renton

(Testimony of Fred Nelson.)

and Renton Junction. I saw him from time to time after that. He put in rose bushes and what he didn't use for rose bushes he put into corn and potatoes—garden stuff. I don't know how many roses he put in but I think four rows through from the county road to the back of the land, about 500 feet long—between 4 and 500 feet long. The entire 2 acres was put into crop. I saw him do some hoeing on the place—light work. I did not see him plant any rose bushes. He had a man helping him there. He was not on the property at all times so far as I know, but I saw him on the property, working around and doing a little something. There was a vegetable stand put up in front of [66] his place when the corn was ripe to sell products to the public. I never saw him tending the stand, but I saw a boy tending to it.

The witness, FRED NELSON, further testified as follows on

Cross-examination.

All I saw him do on the place was light work. He had someone else do the heavy work.

At this time Defendant's Exhibit "A–2' 'is offered and admitted in evidence, and marked for identification.

At this time Defendant's Exhibit "A–4" (marked for identification), being application for term insurance and application for compensation and application for conversion of the war risk insurance, is admitted in evidence, over the objection of the plaintiff.

TESTIMONY OF ALEX KUSNIERZ, IN HIS OWN BEHALF (RECALLED).

ALEX KUSNIERZ, recalled as a witness on his own behalf, testified further as follows on

Direct Examination.

Last spring the truck garden was in operation; last summer I was with the man at Tukwila. It lasted for awhile. I did not make a profit out of my garden. On my own place I did a little work. I did not have a man all the time—for cultivating and plowing and things of that kind I had a man. I borrowed on my policy and from my brother to buy my own place.

The witness, ALEX KUSNIERZ, further testified as follows on

Cross-examination.

I did a little light work on this place and I had a vegetable stand in front *of*. I sold a little of the products [67] from the stand. It was up there about two months during the corn season. I did some of the work putting out the 20,000 cuttings. I had some help.

Plaintiff's Exhibit 1 was offered and admitted in evidence.

Both parties rested.

Whereupon the Government renewed its motion for a directed verdict upon the ground, that the evidence is wholly insufficient to sustain the allegations

of the complaint in that no medical evidence or other evidence was adduced which shows that the condition of the plaintiff was permanent prior to at least 1924 and all of the evidence thereof shows he was not totally disabled from the date of his discharge from the service or the date alleged in the complaint; and on the further grounds that the plaintiff, effective on January 1st, 1920, effected a conversion of $5,000 of his term insurance into an ordinary life insurance contract and that by reason thereof the plaintiff is estopped from asserting permanent total disability prior to the date of such conversion; and thereafter he is not entitled to recovery upon the original term insurance contract; which motion was denied, and exception thereto taken in full by the Government.

Whereupon opening argument is waived by counsel for plaintiff, and defendant presents argument, followed by closing argument of counsel for plaintiff. [68]

INSTRUCTIONS OF COURT TO THE JURY.

Whereupon the following instructions were given to the jury:

The plaintiff in this case seeks to recover on a $10,000 dollar war risk insurance policy issued to him in November, 1917, while he was in the army of the United States. He claims that he was permanently and totally disabled on the 31st day of December, 1918,—that is the date from which this total disability may be based.

The Government denies the total disability,—the total and permanent disability. The Government likewise contends that the plaintiff had a policy reinstated in the sum of five thousand dollars on application made for conversion on the 26th of January, 1927, and after that an endowment policy was issued, and this was in force until as late as December 31st, 1927, when application was made for a loan to the plaintiff, and a loan was effected in a certain sum testified to.

At the conclusion of the case the Government moves to dismiss, which I denied this morning, holding that the equitable defense that was interposed here has not been sustained as far as that was concerned, and the matter would be submitted to you as to whether there was permanent and total disability on the 31st day of December, 1918; and if there was a total and permanent disability on that date, then the Court must adjust between the Government and the plaintiff with relation to the loan obtained on the other policy. If he was totally and permanently disabled on that date, then the conditions or the amounts due upon the policy matured at that time, and the matter would have to be reckoned as of that date in pursuance of the provisions of the policy and the law. [69]

You are instructed that the burden of proof in this case is upon the plaintiff to show by a fair preponderance of the evidence that he was totally and permanently disabled on the 31st day of December, 1918, and if he has not shown that, then the plaintiff may not recover. It is not incum-

bent upon the Government to show that he was not totally and permanently disabled, but it is a burden cast upon the plaintiff to show that as a fact he was totally and permanently disabled at the time and that the total disability was reasonably certain to continue throughout his life. Of this fact and the finding of that fact you are the sole judges, and you must determine what the facts are that have been established from the evidence which has been presented, and you can't conclude upon a speculation or surmise that is not sustained by the evidence either way, but determine this upon the evidence presented, either orally or by the exhibits which have been admitted, and determine what the truth is; and if the plaintiff has not shown by a fair preponderance of the evidence that he was totally and permanently disabled on the 31st day of December, 1918, then he is not entitled to recover, but if he has shown by a fair preponderance that he was totally and permanently disabled on that date, then he is entitled to recover.

This is simply a matter of contract between the Government and the plaintiff. It is not a matter of sympathy or a matter of largesse to be distributed by the Government, but it is simply a matter of contract between the parties. And I think I might say it has nothing to do with the compensation given him by the Government. [70]

There has been some discussion on both sides with relation to the manner in which these things are paid, but we are not concerned with how they are paid. As a matter of fact, the Government entered

into this insurance business the same as an insurance company; and this is a contract upon the payment of certain premiums and the continued payment of premiums at the particular times specified and it is a condition that if the party becomes totally and permanently disabled at any time, then he need not pay any further premiums.

There is likewise a provision of law whereby persons are provided for by the Government who have been in the Government military service in the late war who are disabled and who have no insurance contracts. Those persons are rated by the Veterans' Bureau as to the extent of the disability and they are paid certain sums at certain times for certain ratings given them. The plaintiff is not in that class, in this case. He may be rated by the Veterans' Bureau; I don't know. And he may be receiving compensation; I don't know. Nor am I concerned about it. But we do know that he received vocational training, and that while he was in training he received a certain stipend for his support during the period of training.

I almost feel that you know as much about this total disability as I do. You have been sitting in a number of cases of this kind.

There are two things that must be established by a fair preponderance of the evidence: First, his total disability; and the second, the permanency of it, or the reasonable certainty that it is permanent. These must go together and be considered together. [71]

Total disability is deemed permanent when it

results from a fixed condition of mind and/or body which renders it reasonably certain that the plaintiff will continue to be totally disabled throughout the remainder of his lifetime. Total disability is a relative term. It is not confined to the insured's employment or strength or facility to pursue continuously his usual vocation, but it is a condition which prevents him from doing anything whatsoever pertaining to an occupation, every part of which he can do and perform and receive from it gainful results.

The measure of total disability is whether the insured's condition or disability renders it impossible for him to do anything within the requirements to follow continuously a gainful employment. The ability to work or apply one's self spasmodically or intermittently for short periods of time does not meet the requirements, the intendment being that the injured party shall be able to adapt himself to some occupation or pursuit or employment which will bring him gainful results, something that will be dependable for earning a livelihood.

The amount of gain is not so material, except that the pursuit of the endeavor must be one tantamount to a substantially gainful employment.

Total disability, to be permanent, must be such as is founded upon conditions which render it reasonably certain that it will continue throughout life, and it is essential that the mental and physical condition of the person so disabled be considered, and when so considered, the inquiry is whether the conditions are such from which the conclusion may be

deduced that it is reasonably certain [72] that the disability will continue throughout life.

Reasonable certainty is not a matter for surmise or speculation. It is such as a reasonably prudent, careful, scientific and experienced man would conclude would probably be the result of conditions ascertained and present, as a basis for deduction.

Permanent total disability, within the meaning of this law and policy, does not necessarily mean that a person must be bedfast or bedridden. An attempt to work, inability to work being present, does not necessarily negative a condition of permanent total disability, but the essence of permanant total disability involves this question, which you must answer as a question of fact: Has the plaintiff at all times subsequent to the 31st day of December, 1918, been suffering an impairment of mind and/or body which prevented him from continuously following a substantially gainful occupation, and has it been since said date reasonably certain that this condition would continue throughout life?

You will take into consideration every fact which has been presented here, and in determining whether the plaintiff was totally and permanently disabled upon the date which I have indicated to you which must be reckoned, you should bear in mind the circumstances—and he perhaps knew better than anyone else his condition, whether he was disabled—and then find out what he did from the time of discharge, and continue down through the relations which have been disclosed here, the em-

ployment with this concern that was testified to here, that he was employed from October 1918 to July, 1919, the wages received and the regularity of his employment, and determine what effect that had, and [73] determine whether he revealed by his conduct the true relation and status physically and mentally in the discharge of his duties.

Likewise take the testimony of the witnesses, what they stated with relation to his disability. What did he suffer? What occasioned the disability? And then the fact of his application for the term insurance in January 26, 1920, in which nothing was stated about total disability, and the keeping in force of the five thousand dollar term insurance and changing it into an endowment policy, and keeping that insurance up until in 1927, and then applying for a loan upon that.

If he was totally and permanently disabled during this time, why didn't he make it manifest to the Government, and claim the maturity of the policy?

These are matters to be taken into consideration. They are not conclusive. Is there anything to lead you to believe that he was honestly mistaken as to his condition, or is he now trying to assume a status which in reality does not exist?

The record shows that he didn't commence this action until in July, 1927. These are circumstances and elements to be taken into consideration, together with his conduct. And then take the testimony with relation to his condition, the testimony of the doctors,—what they actually found, what they said with relation to his disability being

total and permanent. And from all this determine as twelve fair-minded men what the truth is. And if you believe that the plaintiff has proven by a fair preponderance of the evidence that he was totally and permanently disabled on the date I have given you, then it is your duty to return [74] a verdict in his favor; but if you are not convinced that the fact has been established by a fair preponderance of the evidence, then it is just as pronouncedly your duty to return a verdict in favor of the defendant in this case.

Preponderance of the evidence does not mean the greater number of witnesses testifying to any fact or state of facts. It means the testimony which has the convincing force; the quality of the evidence. It may be one witness or one circumstance, or one exhibit, that outweighs any others.

Of course, the plaintiff is interested. Did he say anything on the stand to indicate that he was falsifying, that he wasn't telling the truth? Was he fair in his testimony? Take into consideration every element detailed by the witnesses on the stand and disclosed by the record which is admitted, and conclude what you believe to be the right.

Whereupon counsel for the plaintiff excepted to the Court's reference to the date when he commenced action; to the reference as to why he continued to pay the premium; and to the reference to compensation and vocational training pay.

The Court further instructed the jury: I stated to you these are matters to be taken into consideration, that they are not conclusive, but simply mat-

ters and elements to be taken into consideration in determining what is the fact.

The defendant then took an exception to the Court's instruction in reference to the conversion of the insurance; and also an exception to the Court's failure to give Defendant's Requested Instruction No. 7, all relating to conversion. [75]

The COURT.—That matter of the merger and conversion is a matter that must be disposed of on the equity side, and that the matter will be submitted with relation to the disability on the date which I have given, and that is a matter which the Court will have to dispose of later on the equity side of the court, if the jury finds as a fact that he was totally and permanently disabled on the 31st day of December, 1918.

On agreement of counsel for plaintiff and defendant, the date was changed to October, 1918—October 10th, the Court stating:

Where I have used the 31st day of December, 1918, in my instructions, I should have used October 10, 1918. That will be inserted in the form of verdict. There are two forms of verdict. One will be for the defendant; the other will be for the plaintiff, fixing the date of permanent and total disability on the date given. It will take your entire number to agree upon a verdict, and when you have agreed you will cause it to be signed by your foreman, whom you will elect immediately upon retiring to the jury-room. I will send in the pleadings. They are not evidence, but merely the statement of the issues tendered.

The circular I will not send out. That is a matter which the Court decided in disposing of the equitable defense this morning, with which the jury has nothing to do. I will send out Government's Exhibits "A–2" and Government's Exhibit "A–4." [76]

WHEREUPON the jury retired to deliberate on their verdict.

The defendant herein prays that this, its proposed bill of exceptions, be allowed, settled and signed.

ANTHONY SAVAGE,
United States Attorney.
TOM DeWOLFE,
Assistant United States Attorney.
LESTER E. POPE,
Regional Attorney U. S. Veterans' Bureau. [77]

[Title of Court and Cause.]

ORDER SETTLING BILL OF EXCEPTIONS.

The above cause coming on for hearing on this day, on the application of the defendants, to settle its bill of exceptions heretofore duly lodged in this cause, counsel for all parties appearing; and it appearing to the Court that the time within which to serve and file its bill of exceptions in the foregoing cause has been duly extended, and that said bill of exceptions, as heretofore lodged with the Clerk, is duly and seasonably presented for settlement and allowance; and it further appearing that said bill of exceptions contains all the material

facts occurring upon the trial of the case, together with the exceptions thereto, and all of the material matters and things occurring upon the trial, except the exhibits introduced in evidence, which are hereby made a part of said bill of exceptions by reference and incorporation and the Court being fully advised, it is by the Court

ORDERED that the said bill of exceptions be and the same is hereby settled as a true bill of exceptions in said cause, which contains all of the material facts, matters, things and exceptions thereto occurring upon the trial of said cause, and the same is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, as a true, full and correct bill of exceptions and the Clerk of the court is hereby ordered to file the [78] same as a record in said cause and transmit it to the Honorable Circuit Court of Appeals for the Ninth Circuit, together with all the original exhibits as a part thereof.

Signed in open court this 25 day of Feb., 1929.

JEREMIAH NETERER,
United States District Judge.

Received a copy of the within proposed bill of ex. this 8 day of Feb., 1929.

W. G. BEARDSLEE,
Attorney for Pltff.

[Endorsed]: Lodged Feb. 9, 1929.

[Endorsed]: Filed Feb. 25, 1929. [79]

[Title of Court ond Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please issue certified copy of record in the above-entitled cause, and mail same to the Clerk of the Circuit Court of Appeals, San Francisco, California.

TOM DeWOLFE,
Asst. United States Attorney. [80]

1. Complaint.
2. Answer.
3. Reply.
4. Verdict.
5. Order of October 23, 1928, allowing 60 days in which to lodge bill of exceptions.
6. Petition for new trial.
7. Order of Nov. 5 denying petition for new trial.
8. Order of Nov. 5, extending time to lodge bill of exceptions.
9. Judgment.
10. Stipulation extending time to lodge bill of exceptions until Feb. 20, 1929.
11. Order of Feb. 4, 1929, extending time to lodge bill of exceptions until Feb. 20, 1929.
12. Bill of exceptions.
13. Petition for appeal.
14. Order allowing appeal.
15. Notice of appeal.

16. Assignment of errors.
17. Citation.
18. Order of Feb. 18, 1929, fixing Feb. 25, 1929, as date for settling bill of exceptions.
19. All exhibits.
20. This praecipe.

Received a copy of the within ——— this 28th day of Feb., 1929.

W. G. BEARDSLEE,
F. M. B.,
Attorney for Ptf.

[Endorsed]: Filed Feb. 27, 1929. [81]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 81, inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitutes the

record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate, or return to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, to wit: [81–A]

Clerk's fees (Act of Feb. 11, 1925) for making record, certificate or return 225 folios at 15¢	$33.75
Certificate of Clerk to Transcript of Record, with seal	.50
Certificate of Clerk to Original Exhibits, with seal	.50
Total	$34.75

I hereby certify that the above cost for preparing and certifying record, amounting to $34.75 will be included as constructive charges against the United States in my quarterly account to the Government of fees and emoluments for the quarter ending March 31, 1929.

I further certify that I hereto attach and herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 28th day of February, 1929.

[Seal] ED. M. LAKIN,

Clerk, United States District Court, Western District of Washington.

By S. E. Leitch,
Deputy. [81–B]

[Title of Court and Cause.]

CITATION ON APPEAL.

United States of America,
Western District of Washington,—ss.
Northern Division,—ss.

The President of the United States to Alex Kusnierz, Plaintiff, and Beardslee & Bassett, Attorneys for Plaintiff:

You, and each of you, are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals to be held at the city of San Francisco on the 11th day of March, 1929, pursuant to an order allowing appeal filed in the office of the Clerk of the above-entitled court, appealing from the final judgment signed and filed on the 14th day of November, 1928, wherein the United States of America is defendant and Alex Kusnierz is plaintiff, to show cause, if any there be, why the judgment rendered against the said appellant as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESSETH the Honorable JEREMIAH NETERER, United States District Judge for the Western District of Washington, Northern Division, this 11th day of February, 1929.

[Seal] JEREMIAH NETERER,
United States District Judge.

Received a copy of the within citation this 8th day of Feb., 1929.

W. G. BEARDSLEE,
Attorney for Pltff. [82]

[Endorsed]: Filed Feb. 11, 1929. [83]

[Endorsed]: No. 5747. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Alex Kusnierz, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed March 4, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5747

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

ALEX KUSNIERZ, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

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U. S. GOVERNMENT PRINTING OFFICE : 1929

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 5747

UNITED STATES OF AMERICA, APPELLANT

v.

ALEX KUSNIERZ, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, UNITED STATES OF AMERICA

STATEMENT OF THE CASE

Alex Kusnierz, hereinafter called the plaintiff, applied for and was granted War Risk Term Insurance in the sum of $10,000 while in the Army in the month of November, 1917. Premiums were paid to include the month of December, 1919, on the $10,000 term insurance. It is stipulated that on $5,000 of term insurance no premiums have been paid since the month of December, 1919. (R. 40, 41.) Effective January 1, 1920, the plaintiff converted $5,000 of term insurance to insurance under the ordinary life plan and on this contract paid

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premiums to include December, 1922. Effective January 1, 1923, the insurance was converted to a contract under the twenty-year endowment plan and premiums thereon were paid to include December, 1927. On the converted contract it is stipulated that the plaintiff borrowed a total of $1,300, which at the time of trial remained unpaid together with interest thereon as provided by the terms of the contract. (R. 42.)

It is alleged in Paragraph III of the complaint (R. 3) that the plaintiff became permanently and totally disabled on December 24, 1917. This allegation was amended by trial amendment at the close of the trial to allege permanent and total disability from October 10, 1918. (R. 81.) This allegation was denied in Paragraph III of the answer. (R. 5.) The answer affirmatively pleaded that the plaintiff was estopped by reason of said conversion to assert a permanent and total disability prior to the date of such conversion. At the close of the plaintiff's case (R. 44) and again at the close of the trial (R. 72) defendant moved for a directed verdict on three grounds:

> (1) That the evidence was wholly insufficient to sustain the plaintiff's allegations of permanent and total disability.
>
> (2) That by reason of the conversion of $5,000 term insurance, effective January 1, 1920, the plaintiff was estopped from asserting a permanent and total disability prior to that date.

(3) That in any event no recovery could be had in this suit on the $5,000 converted insurance.

The court below denied the motion for a directed verdict to which exception was taken. (R. 45, 46, 73.) The case was submitted to the jury and a verdict was returned finding the plaintiff permanently and totally disabled as from October 10, 1918 (R. 9), and judgment on the verdict was entered November 14, 1928 (R. 9, 10, 11). The defendant filed a motion for a new trial. (R. 11.) This motion was denied and exception noted. (R. 13.) From the judgment in favor of the plaintiff the defendant is here on appeal.

ASSIGNMENT OF ERRORS

I

The District Court erred in denying the defendant's motion for a directed verdict at the close of the plaintiff's case, which motion for directed verdict was interposed on the following grounds:

The evidence is wholly insufficient to sustain the allegations of the complaint in that no medical evidence or other evidence was adduced which shows that the condition of the plaintiff was permanent prior to at least 1924, and all of the evidence thereof shows he was not totally disabled from the date of his discharge from the service or the date alleged in the complaint; and on the further grounds that—

The plaintiff, effective on January 1st, 1920, effected a conversion of $5,000 of his term insurance

into an ordinary life insurance contract, and that by reason thereof the plaintiff is estopped from asserting permanent total disability prior to the date of such conversion; and thereafter he is not entitled to recovery upon the original term insurance contract;

To which denial the defendant took a separate exception to each ground at the time of the trial herein.

II

The District Court erred in denying the defendant's motion for a directed verdict at the close of the entire testimony, which motion for directed verdict was interposed on the same grounds as the defendant's motion for a directed verdict at the end of the plaintiff's case.

To which denial the defendant took separate exception to each ground at the time of the trial herein.

III

The District Court erred in refusing to give Defendant's Requested Instruction No. 7, which requested instruction was as follows:

> You are instructed further that if you find for the plaintiff he is not entitled to recover except upon five thousand dollars of War Risk term insurance for the reason that it is undisputed that effective January 1st, 1920, the plaintiff converted five thousand dollars term insurance to an Ordinary Life Govern-

ment converted policy and that such conversion constituted a merger and novation of five thousand dollars of the term insurance originally applied for by the plaintiff. The plaintiff has not brought suit upon this converted contract of insurance and therefore is not entitled to any rights or benefits thereunder.

IV

The District Court erred in entering judgment upon the verdict herein, when the evidence adduced at the trial of this action was insufficient to sustain the verdict or the judgment.

PERTINENT STATUTES AND REGULATIONS

Section 400 of the Act of October 6, 1917 (40 Stat. 409):

> That in order to give every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the Bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided.

Section 402 of the Act of October 6, 1917 (40 Stat. 409):

> That the Director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. * * *

Section 13 of the Act of October 6, 1917 (40 Stat. 398, 399):

> That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes. * * *

Total permanent disability under this contract is defined by Treasury Decision No. 20 W. R., a regulation promulgated under and pursuant to statutory authority. It provides:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed, in Articles III and IV, to be total disability.
>
> "Total disability" shall be deemed to be "permanent" whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Whenever it shall be established that any person to whom any installment of insurance has been paid,

> as provided in Article IV, on the ground that the insured has become totally and permanently disabled, has recovered the ability to continuously follow any substantially gainful occupation the payment of installments of insurance shall be discontinued forthwith and no further installments thereof shall be paid so long as such recovered ability shall continue.

Regulations of the Bureau, promulgated pursuant to statutory authority, have the force and effect of law and the court will take judicial notice thereof. (*Cassarello* v. *U. S.*, 279 Fed. 396, C. C. A. (3rd); *Sawyer* v. *U. S.*, 10 Fed. (2d) 416, C. C. A. (2nd).)

Section 404 of the Act of October 6, 1917 (40 Stat. 410):

> * * * Regulations shall provide for the right to convert into ordinary life, twenty-payment life, endowment maturing at age sixty-two, and into other usual forms of insurance * * *.

ARGUMENT

Point I

The evidence was wholly insufficient to sustain the plaintiff's allegations of permanent and total disability

To sustain the allegations of permanent and total disability it was necessary for the plaintiff to establish by a fair preponderance of the evidence that during the life of the $10,000 term insurance contract he was totally and permanently disabled within the meaning of this contract. See Treasury

Decision 20 (brief, page 6). That is, plaintiff must prove that he was suffering from a disability of mind and/or body which rendered it *impossible* for him to follow continuously an occupation sufficient to support him in his station in life and that such disability was *then* (October 10, 1918) of such a nature as to make it reasonably certain that he would be so disabled through the remainder of his lifetime.

An analysis of the testimony offered to carry this burden shows that the plaintiff not only was not totally and permanently disabled on October 10, 1918, nor at any time prior to January, 1920, but that he was neither totally disabled nor permanently disabled. (Bill of Exceptions, R. 22–42.)

Plaintiff's first witness, Thomas E. Henehan, Superintendent of the Seattle Frog and Switch Company, testified (R. 22, 23, 24) to no more than that:

> Plaintiff worked for me around the shop, running the drill, press, riveting, assembling, etc., right after the War in 1918 and 1919. The work he did was neither light nor heavy but medium. I did not notice anything about the plaintiff's physical condition. I had direct supervision over the plaintiff and I saw him at his work. He would have to do a little lifting and riveting required quite a little effort. He was a good riveter. *His work was satisfactory. He was steady on the job eight hours a day.* He worked two or three months in 1918, and while I don't recall,

he may have worked about eight months in 1919.

The second witness, John Kusnierz, who is a brother of the plaintiff, testified (R. 25, 26) in substance:

> I worked with the plaintiff at the Seattle Frog and Switch Company. I saw him work there, but I do not remember how he performed his work. He put in a full eight hours a day. I don't know how long he worked there, but he worked *quite a while in 1918 and 1919.*

The next witness, Mrs. John Kusnierz, a sister-in-law of the plaintiff, testified (R. 26, 27) in substance:

> After he came home from work at the Seattle Frog and Switch Company he had supper and went to bed. *I think* he was tired. I really don't know or remember much about it. I am simply guessing.

The plaintiff himself testified (R. 37, 38, 39, 40) in substance:

> I went home after I was discharged. I was at my brother's for a while; then I went to work for Mr. Henehan either the last part of 1918 or early part of 1919. I had trouble with my chest and nervousness and trouble to sleep. I knew the work was too heavy for me. I could not sleep. I took care of the tools, sharpening drills and dressing them and keeping them ready to go to work. A new foreman put me on heavier work and

I got sick right quick. It was too heavy; that is why I quit.

On cross-examination plaintiff said:

While I was in service I was in the hospital for an operation for my neck and I had pneumonia. As far as I know I got well from the pneumonia and went to work for the Seattle Frog and Switch Company doing part machine work and part sanding frogs and switches. I was required to handle hammers and some riveting work. I put in eight hours a day. I was paid $5 a day. I don't remember how many weeks I worked. The next job they gave me was taking care of the tools; sharpening drills and dressing them and keeping them ready to go to work. *I could work at the light work all right.* I entered vocational training for about a year or a year and four months in the fall of 1919. First I went to the tool room learning the names of the different tools and instruments. I would hand the tool when it was called for. Later I did some of the work a machinist is supposed to do. I used some of the machines that were there. That was required as part of my training. I had to do so much of it every week. *I put in eight hours a day while I was going to school.*

In addition to the foregoing the plaintiff offered certain medical testimony. The first medical witness, Dr. E. F. Ristine, testified (R. 27, 28, 29, 30) in substance:

> I examined the plaintiff on the 18th day of October this year. From examination and observation so far made, I am unable to tell whether he has tuberculosis, or infection of pneumonia, or what. He has some heart trouble and a nervous condition which we classify as neurasthenia. I haven't seen him long enough to say to what extent this condition would disable him. I would not want to state to this jury as to the degree of this man's disability prior to the time I examined him; that is, prior to October 18, 1928.

The next medical witness, Dr. Donald V. Trueblood, testified (R. 30, 31, 32) in substance:

> I first saw the plaintiff in 1926 and at that time the plaintiff complained of dizziness, headache, and nervousness. I concluded that he had some disease of the labyrinth; that is, the semicircular canal connected with the middle ear. It is hard to say whether that condition is going to be permanent or not. That is the only disability I found. I would not want to state as to the degree of his disability prior to my examination.

The next medical witness was Dr. Frank T. Wilt, who testified (R. 33, 34, 35) in substance:

> I first saw the plaintiff November 6, 1924. My diagnosis was traumatic neurosis resulting from an injury, the plaintiff having told me that he was in an automobile accident in December, 1917. I can not tell what caused his condition. While I think he has been totally and permanently disabled since I

> have known him, *I would not want to state as to the degree of his disability prior to the time I examined him.*

Where in all of the foregoing testimony is there any evidence which shows that the plaintiff on October 10, 1918, or at any time prior to January 1, 1920, *had an impairment of mind or body which rendered it impossible for him to continuously carry on a substantially gainful occupation?* Where is there any testimony to show that if he was so disabled that it was founded upon conditions *which rendered it reasonably certain that it would continue throughout his life?*

The medical witnesses, whom it must be admitted are better qualified and in a better position to hazard an opinion as to what, if any, impairment of mind or body the plaintiff had prior to their examinations, refused without exception to venture such an opinion or to hazard such a guess. The nonmedical witnesses who testified for the plaintiff not only did not show that the plaintiff suffered an impairment of mind or body which prevented him from engaging in gainful employment, but, on the contrary, definitely stated that the plaintiff did work, that he did engage in gainful employment for a period of eight or ten months, and the plaintiff himself testified that while it was difficult for him to engage in *heavy* work, he could and did engage in the *lighter* work given him at the Seattle Frog and Switch Company; that he received $5 a day for his work; that this continued for eight or

ten months in 1918 and 1919, and that following that he was engaged in vocational training, successfully carrying on the same kind of work.

The contract here under consideration is matured if the plaintiff *can not* work, not if he *does not* work, and a verdict finding this man permanently and totally disabled from October 10, 1918, or from any other date prior to January 1, 1920, is reached only after delving deep into the realms of conjecture.

On the evidence offered by the plaintiff in this case the Court should have as a matter of law directed a verdict for the defendant.

In the case of *Interstate Compress Co.* v. *Agnew,* decided by the Circuit Court of Appeals for the Eighth Circuit, and reported in 276 Fed. 882, 887, it is stated:

> The rule in these courts (Federal Courts) is that in each case tried by a jury the question of law always arises at the close of the evidence whether or not there is such substantial evidence of the plaintiff's cause of action as will sustain a verdict in his favor and warrant the trial court in refusing in the exercise of its judicial discretion to set a verdict in his favor aside if rendered, and any evidence, a scintilla of evidence is not sufficient to warrant such a refusal. This question of law arises on a request for a peremptory instruction made before the case goes to the jury. The jurisdiction is conferred and the duty is imposed upon the trial court to decide it and, on exception, upon the appellate court to review that decision.

> The jury has no jurisdiction of this issue of law, and its verdict after the trial court has decided it does not deprive the appellate court of its jurisdiction or relieve it of its duty to review its decision by the trial court.

In the case of *United States of America* v. *Donald McPhee* (C. C. C., 9th Circuit, No. 5635), decided March 11, 1929, this Court, after reversing the judgment of the Trial Court, for other reasons, says:

> In view, however, of another trial, we deem it proper to say that in our judgment the motion for a directed verdict was ample to challenge the sufficiency of the evidence, and should have been sustained.
>
> We can find no evidence in the record showing or tending to show that the appellee was totally and permanently disabled at any time before the policy expired. * * *
>
> Total and permanent disability within the meaning of a war-risk insurance policy does not mean absolute incapacity to do any work at all. *But there must be such impairment of capacity as to render it impossible for the assured to follow continuously some substantially gainful occupation, and this must occur during the life of the contract.* (Italics ours.)
>
> War-risk insurance is not a gratuity but an agreement by the Government, on certain conditions, to pay the assured certain sums per month if he becomes totally and permanently disabled while the contract of insurance is in force. The burden is on one suing on such a contract to show that he was

> in fact permanently and totally disabled at some time before the contract lapsed.

In *Northern Pac. Ry. Co.* v. *Jones,* 144 Fed. 47, 52, the Court says:

> Where from any proper view of the undisputed or established facts, the conclusion follows as a matter of law that the plaintiff can not recover, it is the duty of the trial court to direct a verdict. (Cases cited.)

In *Commissioners, Etc.,* v. *Clark,* 94 U. S. 278, 284; 24 L. Ed. 59, 61, the Court says:

> Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit, that, before the evidence is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed.

While it seems apparent that the plaintiff wholly failed to make a prima facie case, there can be no doubt as to the error of the Court in giving the case to the jury after hearing the defendant's evidence.

The first witness for the defendant, U. M. Henehan, testified (R. 49) in substance:

> The plaintiff started to work for the Seattle Frog and Switch Company October 26,

1918, and worked from that date to July 19, 1919. During all this time he received pay at the rate of $5 per day, and the first week he worked five days; the next week every day; the next week one day; the next week four days; the next week he did not work; the next week four days; the next week five days; the next week six full days, together with overtime; the next week every day; the next three weeks five days each week; the next week every day; the next week five days; the next four weeks every day; the next week five days; the next week six days; the next week five days; the next week every day, plus overtime; the next week every day; the next week five days; the next six weeks every day each week; the next two weeks five days each week; the next week six days; the next week five and one-half days; the next week six days; the next two weeks five days each week; and the last week one day, which was the end of his employment with this Company.

The next witness for the defendant, Dr. Adolph Bronson, testified (R. 52) in substance:

I examined the plaintiff April 16, 1919, and found an enlargement of the heart. I treated him on February 15, 1919, and saw him three or four times for inflammation of the right ear. This ear condition cleared up under treatment at the end of two weeks. I believe at the time he was able to do light work.

The next witness for the defendant, Dr. A. D. Tollefsen, testified (R. 53, 54, 55) in substance:

> I examined the plaintiff in February, 1925, and my diagnosis was no cardiac pathology. From the condition of the plaintiff's heart there was no reason why he should not have been following some gainful occupation.

The next witness for the defendant, Dr. A. C. Feaman, testified (R. 55) in substance:

> I examined the plaintiff on May 21, 1928. I examined his lungs and heart. I found his lungs negative—that is, no evidence of any lung pathology. The heart condition showed no evidence of any heart disease. I found nothing that would prevent him from following some substantially gainful occupation.

The next witness for the defendant, Dr. I. A. Dix, testified (R. 56) in substance:

> I examined the plaintiff on May 21, 1928. I made a general physical examination and referred him to a specialist for examination of the ears and heart. I only found flat feet, bilateral, second degree, with no objective symptoms that would be disabling. I would not say that he was in such condition, that he was of such disability, that he could not follow some substantially gainful occupation.

The next witness for the defendant, Dr. William E. Joiner, testified (R. 57) in substance:

> I examined the plaintiff's eyes November 3, 1919. I specialize in diseases of eye, ear, nose, and throat. On March 1, 1920, I ex-

amined the plaintiff's ears. The plaintiff complained about noises in the right ear; by that I mean inflammation of the ear, *which came on suddenly.* The plaintiff stated the ear was punctured at that time. That would be an acute *abscess.* I examined him again in November and December of 1920, and in February of 1921. While he still complained of ringing or buzzing in the ear, *I found his ear normal.* I examined him again in February and November of 1923, and while he still complained of buzzing, his hearing was normal. I examined him again on May 21, 1928, and his hearing was normal except on the watch test.

The next witness for the defendant, Dr. A. J. O'Leary, testified (R. 59, 60) in substance:

I examined the plaintiff in June, 1928. I specialize in nervous and mental diseases. I made a diagnosis of neurasthenia. I would consider his neurasthenia as secondary to a toxic goitre for which he had been previously operated on. I would say he could follow some light occupation.

The next witness for the defendant, Dr. G. O. Ireland, testified (R. 62) in substance:

I examined the plaintiff on October 24, 1923, to determine whether or not he had any nervous or mental disease. My conclusion of a metal test made was that there was no psychosis present, and from the evidence in the neurological test there was a neurasthenia present. There was certainly no organic

> condition. I would not say from my examination and observation of him that he could not follow a gainful occupation. When I say gainful occupation for the plaintiff I do not mean one that would be a gainful occupation for me. I doubt if I could get along on what he could make, but according to his own information he was sending money home to Poland. Therefore, I think his occupation was to a certain extent gainful.

The defendant then called two lay witnesses (R. 67, 69) who testified that in 1926 and 1927 that they engaged in certain business dealings with the plaintiff, more or less in the nature of partnerships, wherein they furnished the materials and the plaintiff *furnished the work.* In rebuttal the plaintiff was called on his own behalf (R. 72) and admitted in engaging in truck gardening, etc., as late as 1927. He testified that he did not have a man assisting him at all times, but did hire help to do the cultivating and plowing. He further testified that he did not make a profit on this venture.

Drawing from this evidence every inference favorable to the plaintiff which might be drawn therefrom, it is submitted that the conclusion must be reached that the plaintiff was neither totally nor permanently disabled on October 10, 1918, nor any date prior to January 1, 1920. The plaintiff himself admitted engaging in truck gardening as late as 1927. It is immaterial that from this venture he did not make a profit, for that is one of the risks

which he as well as any other person going into business must assume. As the Trial Court said in this case in instructing the jury (R. 77):

> The amount of gain is not so material, except that the pursuit of the endeavor must be one tantamount to a substantially gainful employment.

Under these circumstances there was no question to submit to the jury and the Court should have directed a verdict for the defendant.

In the case of *Midland Valley R. Co.* v. *Fulgham,* 181 Fed. 91, 95, the Court states:

> Conjecture is an unsound and unjust foundation for a verdict. Juries may not legally guess the money or property of one litigant to another. Substantial evidence of the facts which constitute the cause of action * * * is indispensable to the maintenance of a verdict sustaining it. (Cases cited.)

In the case of *Baltimore & Ohio R. R. Co.* v. *Groeger,* 266 U. S. 521, 524; 69 L. Ed. 419, 422, the Supreme Court says:

> Many decisions of this Court establish that, in every case, it is the duty of the judge to direct a verdict in favor of one of the parties when the testimony and all the inferences which the jury could justifiably draw therefrom would be insufficient to support a different finding.

In the case of *Pleasants* v. *Fant,* 22 Wall. 116, 123; 22 L. Ed. 780, 783, the Supreme Court of the United States said:

> It is the duty of a court, in its relation to the jury, to protect parties from unjust verdicts arising from ignorance of the rules of law and of evidence, from impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of a trial. This is done by making plain to them the issues they are to try, by admitting only such evidence as is proper in these issues, and rejecting all else; by instructing them in the rules of law by which that evidence is to be examined and applied, and finally, when necessary, by setting aside a verdict which is unsupported by evidence or contrary to law.
>
> In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial.

Point II

By reason of the conversion of $5,000 term insurance effective January 1, 1920, the plaintiff was estopped from asserting a permanent and total disability prior to that date

In his complaint plaintiff asserted that he applied for a policy of War Risk Term Insurance in the sum of $10,000 and thereafter there was deducted monthly from his pay the sum of $6.10 as premiums for said insurance. That plaintiff was discharged from the service on October 10, 1918. (R. 2.) The answer filed in behalf of the Government affirmatively pleaded that, effective January 1, 1920, plaintiff converted $5,000 of his term insurance to an ordinary life policy and paid premiums thereon to include December, 1922. That effective January 1, 1923, he converted his ordinary life policy into a twenty-year endowment policy and paid premiums thereon to December, 1927. That at the time of conversion no reference was made to the remaining $5,000 term insurance, and no premiums were paid thereon and that this portion of the term insurance lapsed for nonpayment of the premium due January 1, 1920. That by reason of the conversion as aforesaid plaintiff represented that he was not totally and permanently disabled prior to that date, and that plaintiff was estopped to assert that he became totally and permanently disabled prior to January 1, 1920. (R. 5, 6.) The reply filed by the plaintiff admitted that said conversions and reinstatements were made, but alleged that such con-

versions and reinstatements were necessary to protect plaintiff's policy of War Risk Insurance and on the further representations that such conversions and reinstatements would in no way affect the recovery of his original policy of War Risk Insurance. (R. 8.)

It was stipulated (R. 40) that plaintiff applied for and was granted $10,000 War Risk Term Insurance; that during the time plaintiff was in the military service premiums were deducted from his service pay, and that thereafter the premiums were paid on said $10,000 term insurance to December, 1919; that, effective January 1, 1920, plaintiff converted and merged $5,000 of the term insurance to an ordinary life insurance converted policy, on which premiums were paid to include December, 1922 (R. 41); that, effective January 1, 1923, the plan of insurance was changed from an ordinary life insurance converted policy to a 20-year endowment converted policy, on which premiums were paid to include December, 1927; that the United States Veterans' Bureau loaned on the 20-year endowment Government insurance policy the sum of $300 on November 15th, 1927, and the further sum of $1,000 on December 31, 1927, both of which said loans are unpaid, together with interest thereon at the legal rate (R. 41, 42). That no premiums were paid on the remaining $5,000 term insurance from and after January 1, 1920. (R. 41.) At the close of plaintiff's case defendant moved for a directed verdict on the ground, among others, that

by conversion of his insurance on January 1, 1920, plaintiff is estopped from asserting a permanent and total disability prior to the date of such conversion, and that thereafter he is not entitled to recovery upon the original term insurance contract. (R. 44.) This motion was denied by the court and an exception noted to such ruling. (R. 44, 45, 46.)

The plaintiff in the present action based his right of recovery on his $10,000 yearly renewable term insurance contract. The pleadings and the stipulated facts show that this contract came into existence in November, 1917, and remained in existence by virtue of payment of premiums until December 31, 1919, only. The facts stipulated clearly show that plaintiff converted $5,000 of his insurance on January 1, 1920, and never thereafter paid any premiums on the remaining $5,000 insurance. The defendant urged upon the court that the plaintiff was barred from asserting a permanent and total disability prior thereto, as a basis of laibility under his original $10,000 yearly renewable term insurance contract.

The pertinent statutes above quoted for the convenience of the court clearly show that Congress made provisions for insurance protection available to those in the military or naval service; that this insurance protection might be accepted or rejected at the option of each individual member of the military or naval forces; that if accepted the applicant for insurance must not only make applica-

tion therefor but must also pay premiums thereon so long as such protection was desired, and that premiums must be paid thereon both during and subsequent to military service; that each insured should have a right to convert yearly renewable term insurance into other usual forms of insurance, and that the contract of insurance afforded protection against permanent and total disability or death when occurring during the lifetime of the contract of insurance only. (Section 404, Brief p. —.)

War Risk Insurance, like every other kind of insurance, is essentially an indemnity against a future loss. It could not be granted to an individual who was permanently and totally disabled any more than it could be granted to one who had previously died. As a basis of entering into such contract it must be assumed by both parties that the contingencies to be insured against have not already occurred. It is unnecessary to cite any of the numerous authorities to show that an insurance contract is void when there is no risk which can be insured against and that in such contingency money paid as premium is unearned and must be refunded to the insured. As stated above, total permanent disability is one of the contingencies insured against in the contract of War Risk Insurance. Plaintiff by requesting conversion of his yearly renewable term insurance at least impliedly represented that he was not permanently and totally disabled in his application for conversion of $5,000 insurance. The Gov-

ernment was required under the provisions of Section 404 (Brief p. 7) to grant conversion on application without medical examination. Moreover, Section 400 (Brief p. 5), limited the amount of insurance which might be granted to any one individual to $10,000. As the plaintiff prior to January 1, 1920, was carrying $10,000 term insurance, it is obvious that his right to a War Risk Insurance had been fully exercised and that the ordinary life policy for $5,000 insurance, issued to him February 1, 1920, could only be issued as a substitution of $5,000 of his term insurance. If the insured had become permanently and totally disabled prior to that date, his insurance would have matured and there would have been nothing left to convert. The fact that the Government had no right to require a medical examination prior to conversion does not in any way suspend or nullify the basic proposition that the Government could not issue insurance to one who was permanently and totally disabled, but it must have been assumed by both the plaintiff and the Government as a basis of converting $5,000 of the yearly renewable term insurance that plaintiff was not permanently and totally disabled, and plaintiff is now estopped to deny the fact assumed.

In considering the effect of conversion of War Risk Insurance the Attorney General in an opinion dated January 4, 1921 (32 Ops. Atty. Gen. 379, 386, 389, 390) said:

> The term policy having matured into a claim by the happening of the event insured

against it ceases to constitute "insurance."

To concede that one totally and permanently disabled may convert term insurance into a new form of insurance would be to admit that one similarly disabled might take out term insurance, and that, as I have heretofore stated in my opinion of July 18, 1919 (31 Ops. Atty. Gen.) he may not do. I there stated "what is provided for is a contract of insurance against something that may happen and not of indemnity for something which has already happened." * * * And there is nothing in the statute indicating that Congress intended that claims which may have resulted from either the death or the total permanent disability of the insured should be converted. It is "insurance" that is made convertible. * * * But where, as in question 4, a soldier protected by term insurance, who has suffered disability which has been rated by the Bureau of War Risk Insurance as less than total permanent, applies for conversion, and same is granted, the conversion is good, for thereafter the soldier will be estopped from claiming, and the War Risk Insurance Bureau will be estopped from finding *as a fact* that at the time of conversion the applicant for conversion was totally and permanently disabled and therefore ineligible for same. * * * The applicant who applies for conversion knowing that he is permanently and totally disabled will be held to have done so with knowledge of the limitation of the authority of the Bureau to grant converted insurance, and ignorance of

the law will constitute no excuse for his act. *Whiteside et al.* v. *United States,* 93 U. S. 247, 257.

In the case of *William M. Stevens* v. *United States,* decided by the United States Circuit Court of Appeals for the Eighth Circuit December 14, 1928, No. 7990, the Circuit Court, affirming the ruling of the trial court in holding that the reinstatement of insurance estopped the plaintiff from asserting a permanent total disability prior to such reinstatement, said:

> * * * At that time the question of permanency of injury, if thought of at all, was speculative merely. The Bureau had never so rated the applicant, nor had any medical examiner, so far as appears from the record. Dr. Reed, a specialist in orthopedic surgery, and in the employ of the United States Veterans' Bureau from 1920 to 1924, called as a witness on behalf of plaintiff in error, testified that the applicant had been examined by him, and under his directions, a number of times, beginning in 1921. During this time an operation was performed by Dr. Diessler which had some beneficial effect upon the knee. The report made was the following: "Disability: Over 10%. Total temporary, due to service. This patient is unable to assume duties for two or three months yet, and he should be under observation and instructed to report back not later than two months. He will later be fit for vocational training." Other examinations were made

by Dr. Reed, and his knowledge of plaintiff in error and of his condition continued between April, 1921, and October, 1924. This trial began March 15, 1927. Dr. Reed made a further examination of plaintiff in error on March 12th. His conclusion at that time was that Stevens was suffering from traumatic arthritis in knee and spine with accompanying hysterio neurasthenia. He reached this conclusion in the light of his present knowledge and said: "At no time did I think he was totally disabled until the present time." Other medical examiners introduced by plaintiff in error were of opinion that at the time of trial the disability was total and permanent. Their testimony goes no further than that. The court being of opinion that the policy was reinstated upon the agreed basis that the insured at the time was not permanently and totally disabled; that upon that basis it constituted a new contract between the parties; that this contract had never been repudiated, and that plaintiff in error was estopped to deny this basic fact so long as the contract stood, in the absence of fraud, accident, or mistake, granted a motion to dismiss the case. * * *

The record convinces that plaintiff in error, without fraud, deceit, misrepresentation, or undue influence, elected to have his insurance reinstated upon the terms specified in the act permitting reinstatement. To that end, the fact that he was not at that time totally and permanently disabled was assumed. Neither he nor any officer of the

> government at that time viewed his disability as permanent. At the time his application was made his recourse against the government under his certificate of war risk insurance, which had lapsed for nonpayment of premiums, was at least problematical. * * * It could not be pleaded in defense that plaintiff was permanently and totally disabled prior to the date of reinstatement. We think under the facts before us, and the law applicable thereto, that plaintiff in error is estopped to recover upon his original certificate on the ground of total permanent disability sustained while that certificate was still in force. Judge Bourquin, in the District of Montana, in *Wills* v. *United States,* 7 Fed. (2d) 137, reached this same conclusion.

The decision of the Court of Appeals for the Eighth Circuit in the *Stevens case* is peculiarly applicable to the case now under consideration. It may be said to be substantially on all fours with the present case. The chief disability in both cases is alleged to be a nervous disease. The physicians who examined the plaintiffs in both cases refused to venture an opinon as to the permanency of plaintiffs' disabilities at the times of their examinations. In both cases a new contract was brought into existence. The conversion of insurance brings into existence a new contract of insurance none the less than a reinstatement of lapsed insurance.

It follows that the Trial Court erred in refusing to hold that plaintiff by conversion on January 1,

1920, was estopped from asserting a permanent total disability on October 10, 1918, or at any time prior to the date of such conversion.

Point III

In any event, no recovery could be had in this suit on the $5,000 converted insurance

At the close of plaintiff's case defendant requested the court for certain instructions, among which was the following (R. 48, 49):

Requested Instruction No. 7

> You are instructed further that if you find for the plaintiff he is not entitled to recover except upon five thousand dollars of War Risk Term Insurance for the reason (48) that it is undisputed that effective January 1, 1920, the plaintiff converted five thousand dollars term insurance to an ordinary life Government converted policy and that such conversion constituted a merger and novation of five thousand dollars of the term insurance originally applied for by the plaintiff. The plaintiff has not brought suit upon this converted contract of insurance and therefore is not entitled to any rights or benefits thereunder.

As heretofore suggested, the maximum amount of insurance which the plaintiff could carry under the limitations of Section 400, *supra,* was $10,000. By conversion of $5,000 insurance, effective February 1, 1920, plaintiff did not and could not secure an aggregate of $15,000 insurance. The converted

insurance for $5,000 secured on January 1, 1920, was retained by the insured until January 31, 1923, at which time his $5,000 ordinary life insurance was changed to a 20-year endowment policy for the same amount, which said policy was in full force and effect (R. 40, 41) subsequent to the time the present action was instituted (R. 7). There is no suggestion that the 20-year endowment policy, which plaintiff now carries, is void or that the plaintiff has surrendered the same, or that the same has been or can be canceled by the Government. There can be no doubt as to the statutory authority of the Bureau to convert term insurance into some other usual form of insurance and there can be no doubt but when converted insurance is issued to an individual having $10,000 War Risk Insurance, as in the present case, the converted insurance is substituted for a like amount of term insurance and that by such substitution a novation is effected which merges all rights and liability under the term insurance in and under the converted contract of insurance. After conversion the rights of the insured, if any, can only exist under the converted insurance contract. No rights can subsequently be asserted under the contract of term insurance; at least unless and until the converted policy has been canceled and the term policy restored. Whether the cancellation of the converted policy and the restoration of the term policy can ever be effected need not be considered here. The fact is that no attempt to effect such an arrange-

ment has even been made. Under these circumstances it is obvious that the court should have given Instructions No. 7, *supra,* and held that if entitled to recover at all in the present action, which was founded upon plaintiff's yearly renewable term contract of insurance, plaintiff could not recover except on the $5,000 term insurance which had not been converted. The trial court clearly erred in entering judgment on the verdict of the jury for the installments payable on $10,000 insurance.

For the reasons above set forth it is submitted that the Trial court erred and that the judgment entered herein should be reversed.

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No. 5747

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

ALEX KUSNIERZ,

Appellee.

Brief Upon Appeal From the United States District Court for the Western District of Washington, Northern Division

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellee

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STATEMENT

Alex Kusnierz, hereinafter referred to as the plaintiff, by his complaint alleges, that he enlisted for service in the United States Army on the 3rd day of October, 1917, and applied for a policy of war risk insurance as soon as the same became available, about

the month of November, 1917, in the sum of $10,000.00; that about the 24th day of December, 1917, the plaintiff was injured in a stage accident while returning to Camp Lewis, and while he was still suffering from the injury received in that accident, he was obliged to undergo an operation for goitre, and the operation was immediately followed by pneumonia and influenza, all of which disabilities had contributed to the permanent physical condition, by reason of which the plaintiff has claimed that he is entitled to the benefits of his war risk insurance, claiming to have been totally and permanently disabled within the meaning of the war risk insurance act from and since the date of his discharge, which was October 10th, 1918 (R. 2 and 3). By the defendant's answer they have admitted all the allegations of the plaintiff's complaint except Paragraph III, which paragraph sets forth the disabilities of the plaintiff, and by Paragraph II of their affirmative defense, the defendant has alleged that after discharge the plaintiff paid the premiums upon his war risk insurance policy to include the month of December, 1919, and on the 1st day of January, 1920, the plaintiff converted $5,000.00 of said term insurance to another form of policy provided by the Government, dropping the $5,000.00 balance of war risk term insurance. The premium on this converted insurance

was paid to include December, 1922, and on the 1st day of January, 1923, the plaintiff again converted to another form of policy provided by the defendant. Premiums were paid on that to include December 1st, 1927 (R. 4-6), and it further alleged that by reason of the conversions therein referred to, the plaintiff represented that he was not totally and permanently disabled prior to the said dates of conversion, and that therefore the plaintiff is estopped to assert that he is totally and permanently disabled prior to that time (R. 6).

The case was tried to a jury which resulted in the verdict finding the plaintiff totally and permanently disabled from October 10, 1918, the date of discharge, and judgment was thereafter entered from which the defendant has appealed, assigning as error:

I.

The trial court's refusal to grant the defendant's motion for a directed verdict at the end of the plaintiff's case on the ground that the evidence was insufficient to sustain a verdict, and

II.

Refusal of the court to grant its motion for directed verdict on the ground that the plaintiff is estopped

from asserting total disability prior to the date of the conversion of this policy by reason of his alleged representations, and

III.

The refusal of the trial court to grant the defendant's requested Instruction No. 7 (R. 48) as follows:

"You are instructed further that if you find for the plaintiff he is not entitled to recover except upon five thousand dollars of War Risk term insurance for the reason that it is undisputed that effective January 1st, 1920, the plaintiff converted five thousand dollars term insurance to an ordinary life Government converted policy and that such conversion constituted a merger and novation of five thousand dollars of the term insurance originally applied for by the plaintiff. The plaintiff has not brought suit upon this converted contract of insurance and therefore is not entitled to any rights or benefits thereunder."

ARGUMENT

I.

The question first raised by the defendant in its brief is whether or not the evidence was sufficient to take the case to a jury, and to sustain the burden of proof. It was only necessary for the plaintiff to show that he was disabled to such an extent as to be unable to follow *continuously* any *substantially gainful* occupation, and that such disability is founded upon con-

ditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. T. D. 20 W. R. This regulation does not require that the claimant be bedridden, but requires only that he be unable to follow continuously any substantially gainful occupation.

Law vs. U. S., 290 Fed. 972.

In discussing the interpretation of the term "total and permanent disability" the court, in the case of *Jagodnigg vs. U. S.*, 295 Fed. 917, said:

"What is meant is clearly the ability of a soldier to earn substantially through independent efforts."

And in the case of *U. S. vs. Cox*, the Circuit Court for the Fifth Circuit said:

"Ability to continuously follow a substantial, gainful occupation implies ability to compete with men of * * * average attainments under the usual conditions of life.

It does not mean that he must be unable to do any work, but only that he be unable to follow any substantially gainful occupation.

As was said by this Court in the case of *U. S. vs. Eiasson*, 20 Fed. (2d) 821:

"The words 'total' and 'permanent' * * * do not necessarily imply an incapacity to do any work at all."

And this interpretation was reaffirmed in the very recent case of *U. S. vs. Sligh*, 31 Fed. (2d) 375, in which case this Court said:

"The term 'total and permanent disability' does not mean that there must be proof of absolute incapacity to do any work at all."

And it was there held that though the plaintiff did work continuously at a gainful occupation, still he was entitled to the benefits of his insurance policy where he was suffering from tuberculosis by reason of which it was inadvisable for him to work.

The defendant in its brief has set forth a part of the testimony of each of the witnesses, which, standing alone, might seem to sustain their contention that the court erred in refusing to direct a verdict for it, but a careful analysis of the full testimony of these witnesses brings us to a different conclusion and sustains the action of the trial court.

The testimony of the witness Henehan (R. 22-23), who testified concerning two jobs the plaintiq had under him, stating that the first job the plaintiff had was neither heavy nor light work, but medium; that the plaintiff quit this job and that thereafter he, the witness, gave the plaintiff a lighter job sharpening tools and drills and "the job in the tool room was not a very active one." (R. 23.) The defendant in its brief has stated the witness' testimony to be that the plaintiff

worked there two or three months in 1918 and about eight months in 1919, but a close review of his testimony will show that the witness disqualified himself from testifying to the length of time the plaintiff worked under him by saying:

"I do not recall what part of 1918 that was."

"You would have to get that from the firm's records?

"* * * I could not say positively. * * *" (R. 22.)

And again:

"I could not say how long he worked. * * *

"You would have to see the firm records" (R. 23).

The defendant has next assumed to analyze the testimony of the witness John Kusnierz (R. 25-26) by restricting the testimony to what the witness said concerning the plaintiff's occupation at the Seattle Frog & Switch Co., where they both worked. A full analysis of that testimony will show that while the witness saw the plaintiff work, he did not make any particular note of how the plaintiff performed his work, but he did say this about it:

"He did not do as much as I did. I dont' think he did as much work as the other men. It was light work that he did." (R. 25.)

And:

"I don't remember how much he got paid, but it was less than I got." (R. 25.)

The rest of the testimony of the witness, which is not mentioned in the defendant's brief, gives a clearer conception of the plaintiff's actual condition by showing his physical reaction after working hours. The witness was especially fit to testify as to his condition inasmuch as the plaintiff lived with the witness. The witness said in substance that the plaintiff looked pale, and he felt tired and would not do any work; that he did very little work around the witness' home where the plaintiff lived—no heavy work; that the things which the plaintiff did were only the menial chores, such as sprinkling the garden and splitting light kindling. (R. 25-26.) The witness also said that the plaintiff quit his job because his chest was swollen. This indicates the reaction the plaintiff suffered from his attempted employment, and brings this case clearly within the doctrine of the *Sligh* case, *supra.*

In analyzing the testimony of Mrs. John Kusnierz (R. 26-27), sister-in-law of the plaintiff, a witness particularly acquainted with the plaintiff's home life and probably better able to show his actual condition than the witness who saw him work for short periods of time, the defendant has omitted in its brief the more essential bits of testimony. Her testimony showed that the plaintiff came to her house as soon as he was discharged, and that at that time he was very

nervous and looked sick; that at that time he did not do much around the house, and that after he had attempted to work he would come home evenings tired and nervous. She said:

"He did not look very god after he quit work the first time he worked. He looked like a sick man." (R. 27.)

Her testimony further showed that this condition continued even after he had quit working and had ben confined in the hospital at Bremerton (R. 26-27). Nor is there anything in the testimony of this witness from which the conclusion can be drawn that she was "simply guessing," which conclusion is attributed to her as a part of her testimony by the defendant in its brief.

The next witness with whom the defendant has concerned itself in this brief is the plaintiff himself. Their analysis of the plaintiff's tstimony is very brief and deals only with that period immediately after discharge, though the defendant by its answer denied that the plaintiff was ever injured or sick, as alleged in his complaint, the evidence of which is entitled to your consideration, inasmuch as the testimony of the medical witnesses is largely dependent upon the plaintiff's history, which is only set forth in his own testimony. The testimony of the plaintiff, contained on pages 36 to 44 of the Record, shows, the facts which

have contributed to the plaintiff's total and permanent disability in substance as follows:

That on the 24th day of December, 1917, he was in a Tacoma-Camp Lewis stage wreck; that he was taken to the Company's quarters and confined for three days, after which he returned to duty for a week, and then reported sick, suffering from nervousness, bruises, soreness and pains in the right side of his body, and about a month later he was sent to the base hospital. This was on or about the 21st or 22nd of January, 1918. That he underwent an operation for reasons unknown to himself, and that he remained in the hospital until the spring of 1918; and that while in the hospital, he also contracted pneumonia. That he was then given a hospital furlough, after which he returned to duty for about a week, and then reported sick again and was sent again to the hospital for three weeks or a month; that he was returned to duty for a period of about three months, after which he was discharged. It further shows that the plaintiff's chest swelled up after his return from his hospital furlough which is the same condition that forced his to quit work at the Seattle Frog and Switch Company. He then testified, concerning his work, that Mr. Henehan helped him quite a bit and that when they got a new foreman, he, the plaintiff, was put on heavier work and he got sick and had to quit. He was troubled

with nervousness, headaches and pains in his chest. He further testified that after he ceased working, he took vocational training, but that his attendance was irergular for a period covering approximately a year, after which time he was hospitalized in the United States Veterans Hospital at Tacoma for a period of three to three and one-half years. That the same conditions which have been present at all the times heretofore mentioned have prevailed up to and including the present time. On cross-examination he testified concerning his work at the Seattle Frog and Switch Company; that he was paid for some days that he didn't work. This testimony is uncontroverted and certainly derogates from the payroll records which the defendant introduced in evidence. He testified that although he was able to do light work, he was weak at times and would have to go and take a rest; that he was able to do the light work only a part of the time. (R. 39.)

This testimony of the plaintiff alone was sufficient to take the case to the jury, and if the jury believed plaintiff, he certainly was entitled to their verdict without the testimony of any other witness than himself. The plaintiff also produced three doctors as witnesses for himself, all of whom had given him examinations at various times, and all of whom are agreed that he was not able to do any work at the

time they made their examinaions, and a review of their testimony (R. 29 to 35) shows this finding in common; that the plaintiff, among other things, is suffering from neuresthenia, and that this condition is probably permanent in view of the fact that it has continued since 1918. Dr. Ristine testified, not only to neuresthenia, but to heart trouble and an inflammatory condition of the lungs, the exact nature of which he could not ascertain at the time (R. 28) and while he said he could not testify to the exact extent of the plaintiff's disability or its duration, still he did say, concerning the present time:

"He is not fit to be employed today. As far as today is concerned, he is totally disabled." (R. 29.)

And on cross-examination he stated that he did not know whether the plaintiff was totally and permanently disabled in 1918 because he did not know anything about him at that time, but he believed that he was so disabled at that time.

Dr. Trueblood, who also testified for the plaintiff, said he found a nervousness and a dizziness caused by a disease of the semi-circular canal connected with the middle ear, and that his findings bore out the complaint of the plaintiff. The doctor also testified as follows:

"I do not believe he will be capable of following a substantially gainful occupation" (R. 31).

And speaking of the permanency of his disability, he said:

"It has lasted all these years and it certainly is chronic. * * * I doubt if it is going to clear up * * *" (R. 31-32).

Dr. Wilt testified that his diagnosis was traumatic neurosis resulting from an injury (R. 33). Also the plaintiff was a neuresthenic, and that there was possibly a hyperthyroidism. As to the plaintiff's ability to work, this witness said:

"Generally it would render him incapable of sustained work. * * * He would be tired all the time." (R. 34.)

And as to the beginning of the plaintiff's disability this doctor testified:

"My impression and diagnosis of this man's condition were that it was first caused from that injury in the automobile accident. I believe that would totally incapacitate him and that the condition is permanent." (R. 35.)

On cross-examination he said:

"I would say he is totally disabled from following a gainful occupation at this time." (R. 35.)

With the combined testimony of the plaintiff and the medical experts last referred to, there can be no question but that the trial court properly submitted the case to the jury, and further there is no question but that the plaintiff had proven a *prima facie* case

sufficient to support the verdict of the jury and sufficient to put the defendant upon its proof. The same question was presented to this Court in the case of *U. S. vs. Eliasson, supra,* in which case this Court held that evidence of ailments and illnesses contracted while in the service and continuing thereafter, was sufficient to sustain a verdict for the plaintiff, and in this case, as in the *Eliasson* case, the court clearly advised the jury that they must be convinced from the evidence, of the plaintiff's total and permanent disability during the term of the insurance, and it was emphasized to them by repetition in the instructions. (R. 73-80).

It is the contention of the defendant in its brief that in all the foregoing testimony there is no evidence which shows the plaintiff to have been totally and permanently disabled on the 10th day of October, 1918. The defendant's contention in its brief, however, is based upon its analysis of the testimony, which analysis is neither complete nor fair, and a full consideration of all the testimony of each of the witnesses conclusively shows that plaintiff's evidence was sufficient to withstand the defendant's challenge. The medical witnesses, while they did not state definitely that the plaintiff's condition existed prior to their examinations, did state that it probably existed from and after the auto accident of which he com-

plained and which occurred long prior to his claim herein, and without an exception each doctor testified that the plaintiff was now totally disabled, and that the condition would probably be permanent. While their examinations do not date back to the plaintiff's injury, they do date back to 1924 and show the same conditions to have existed then that are existing today, and the uncontroverted testimony of Dr. Wilt (R. 35) that the plaintiff's disability arose by reason of the auto accident, and that he has been totally and permanently disabled from and after that time, was sufficient to take the case to the jury.

In the recent case of *LaMarche vs. United States*, 28 Fed. (2d) 828, a similar situation came before this court. In that case the plaintiff was discharged from service on July 16th, 1919, and his policy lapsed on July 31st, 1919; that on the 4th day of August, 1919, he complained of nervousness and was seized with violent pains and was taken to a hospital where he remained for some time. The evidence showed that this condition and the symptoms, after August 4th, 1919, did not differ materially from his condition and symptoms prior to that date, and consequently it was for the jury to determine from the evidence whether he became totally and permanently disabled from the life of his policy. In the opinion in that case the court said:

"His condition and symptoms after August 4th, 1919, did not differ materially from his condition and symptoms prior to that date, and if conditions existing on and after August 4th are attributable to the injury to the hip, might not the jury well find that similar conditions existing prior to that date arose from the same cause."

In the case at bar, as in the *LaMarche* case, the condition existing today and the condition existing in 1924 are attributed by the witnesses to the auto injury, and the jury might well find that the same conditions existing immediately after discarge were attributable to the same cause.

The defendant in its brief has argued not only the plaintiff's disability is not total, but also that his disability was not founded upon conditions which rendered it reasonably certain that it would continue throughout his life; in other words, it is their contention that the disability, if total, is not and was not on the 10th day of October, 1918, permanent. Since the permanency of the disability involves the element of time, it is submitted that where disability has existed for eleven years, that the jury is warranted in finding it to be permanent, and especially so in the testimony of Dr. Wilt that his condition is now permanent and was permanent in 1924, the time when Dr. Wilt made his first examination and diagnosis of the plaintiff's disability. (R. 35.) This view is sus-

tained by the decision in the case of *McGovern vs. U. S.*, 294 Fed. 108, affirmed 299 Fed. 302, in which the court said:

"As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence."

Since the plaintiff's evidence was sufficient to withstand the motion for a directed verdict made by the defendant at the close of the plaintiff's case it necessarily follows that there was no error in denying the motion again when renewed by the defendant at the close of its case. Since, if the plaintiff's evidence alone was sufficient to go to the jury, it was likewise for the jury to determine upon all of the evidence whether or not the plaintiff was in fact entitled to recover and error can not be predicated upon the court's refusal to grant the renewed motion. It is therefore, unnecessary to discuss the defendant's evidence, set forth in their brief, since it is purely for the jury to determine the sufficiency of that evidence to overcome the plaintiff's evidence.

II.

The next point urged by the defendant in his brief is that the plaintiff was estopped to assert permanent and total disability prior to January 1, 1920, by rea-

son of his conversion of his term insurance at that time. The basis for their argument is that the plaintiff at the time of conversion impliedly represented to the defendant that he was not then toally and permanently disabled. The doctrine of estoppel arising as it did in equity and applying only where it would be inequitable or unjust for one party to assert certain facts by reason of his conduct or representations, has no application to an instance where the result of the representations or conduct of the party has worked no detriment to the party asserting the estoppel nor would it have any application where the equities of the situation favored the party against whom the estoppel is asserted.

In considering the law of estoppel in reference to this case we must first analyze the facts, which are as follows: The plaintiff in this case was discharged with a disability which, according to the testimony of the plaintiff's doctors, clearly rendered him incapable of following continuously a substantially gainful occupation (R. 29-31-34), the permanency of which disability, however, was questionable (R. 31), but which has by reason of its long continuation been determined to have been permanent since the plaintiff's discharge (R. 32 and 35), and the jury so found (R. 9). The policy then having matured on the 10th day of October, 1919, by reason of the happening of the

event insured against the plaintiff had nothing to convert on the 1st day of January, 1920, and the defendant had no right to convert his policy at that time. In the opinion of the Attorney General, 32 Ops. Atty. Gen. 379, it was said:

"The term policy having matured into a claim by the happening of the event insured against it ceases to constitute 'insurance'. * * * it is 'insurance' that is made convertible."

The insurance therefore having matured into a liquidated claim the plaintiff by his attempted conversion gained nothing, and the defendant by granting the conversion lost nothing, but rather if the conversion is to be sustained the defendant will have gained to the detriment of the plaintiff, clearly not a case within the contemplation of the equitable defense of estoppel here asserted. As was well said by the court in the case of *Murphy vs. Paine*, 15 Fed. (2d) 570:

"It has been said that estoppel is a shield and not a sword. It is available for protection and cannot be used as a weapon of assault * * *. *Estoppel may be invoked where conduct or statements have positively misled a party and are acted upon by him in good faith to his prejudice, where the conditions are known to the parties, or they both have the same means of ascertaining the truth and where they are under a duty to ascertain the truth there can be no estoppel.*" (Italics ours.)

In the instant case the facts are clearly within the above quoted decision since the defendant had the

records of this man's disability and the history of his case, and had, not equal means of ascertaining the facts, but rather they had means of ascertaining the facts which were not available to the plaintiff and which were greater than the plaintiff's, and they were under some duty to ascertain the facts. Therefore, the basic principle of estoppel, the misrepresentations of the party against whom the estoppel is asserted relied upon by the other party to his detriment, being absent, the plea of estoppel in this case must necessarily fail.

The same conclusion was arrived at in the case of *Jenkins vs. U. S.*, 22 Fed. (2d) 568, in which case the Government granted to the claimant automatic insurance, a form of insurance provided only where one in the service had died or become totally and permanently disabled without having applied for insurance. Claimant in that case accepted the automatic insurance and later brought suit on an alleged $10,000 policy of War Risk insurance. The jury having returned a verdict for the claimant, finding that the deceased had applied for War Risk insurance as alleged, the court thereafter in deciding the equitable defense of estoppel said:

"The right * * to so-called automatic insurance exist only when the one in service died without having applied for insurance. It would seem clear that no

right or authority existed, either on the part of the claimant or on the part of the bureau, to substiute automatic insurance for policy insurance where the same had been applied for. In the absence of two alternative rights, there can arise no question of an election."

And likewise in this case the bureau could not convert a policy of insurance where the same had already matured and, as in the *Jenkins* case:

"Nothing which the claimant did misled or concealed from the bureau facts resulting in prejudicial action on its part. * * * There are present in this case no facts which would warrant the conclusion that the claimant is estopped."

And to the same effect is the case of *Dobbie vs. U. S.*, 19 Fed. (2d), 656, wherein it was said:

"A true estoppel certainly dose not arise in this case as the Government has lost nothing and if, as the jury found, the paintiff has been totally and permanently disabled her policy has been a liquidated demand since that date. She owed no premiums on it, and instead of paying premiums should have been receiving monthly installment; therefore, by the reinstatement of the policy she did the Government no harm."

And, quoting further from the *Dobbie* case, the facts of which are directly analogous to the facts in the instant case:

"If she is estopped by the application to reinstate the policy and the payment of the premiums upon it thereafter to obtain that which she had already by her disability become entitled to, the proceeds of the policy as they accrued, clearly, then any person who

in ignorance of his real condition continues to pay premiums is estopped, upon ascertaining that condition, to claim a total loss, for the payment of the premium is an assertion that the policy had not matured; but that this is not the law has already been decided. *New York Life Ins. Co. vs. Brame*, 112 Miss. 828, 73 So. 806, L. R. A. 1918B, 86."

And to the same effect the case of *Andrews vs. U. S.*, 28 Fed. (2d) 904, decided that a claimant who converted his policy, in the mistaken belief that he would recover from his disability, would not be estopped by representations made in his application to convert, the court said:

"An insured under one of these policies is not justified in making a claim until he is toltally disable and *until he believes it to be permanent. It is quite true that a man may be permanently disable and not know it.* * * * If at the time he should state that he believed he would recover, and was not permanently disabled, it would be a truthful statement of his belief and could not operate as an estoppel." (Italics ours.)

Another well considered case denying the equitable defense of estoppel is that of *Larsen vs. U. S.*, 29 Fed. (2d) 847, in which the facts are substantially the same as those in this case. In the *Larsen* case only $2,000 of a $10,000 War Risk insurance policy had been converted (in the case at bar only $5,000), and in deciding that case the court said:

"All needed diagnoses were in its (bureau's) possession, * * * *the defendant upon the record must*

have known the deceased's condition. The fact deceased did not know his condition and relied upon the bureau in his application for reinstatement and conversion, cannot change the plaintiff's status. The defendant on permanent and total disability was bound to pay by the terms of the policy, the legal obligation having matured. The liability became fixed in the full amount, and acceptance of a part of the due payment, even though it may have been through a reissued policy in lieu of the old, does not change the status nor bar the plaintiff's claim to the balance. *There was no benefit of right accruing to the plaintiff or damage to the defendant* (cases cited) *and the plaintiff gained nothing* * * * the fact is, however, *deceased had due $10,000 and the defendant seeks to satisfy it by the payment of $2,000 and in this the plaintiff would be greatly wronged.*" (Italics ours.)

In the instant case, therefore, the policy having matured and having become a liquidated demand upon the 10th day of October, 1919, the plaintiff was not estopped by the conversion nor can the defendant assert a discharge of its obligation by anything other than the payment of the liquidated demand.

The facts further show that in converting the plaintiff relied upon representations made to him by the bureau (R. 43). At the time the plaintiff converted he had in his possession a folder, being plaintiff's Exhibit No. 1, sent to him by the bureau and advising him that term insurance would be discontinued and that to protect himself he must convert his policy on or prior to a certain date. At the time of receiving this circular the plaintiff was totally and permanently

disabled but the permanency of his disability being dependent upon the passage of time he could not then safely assert a right under the original $10,000 policy because of inability to prove the permanency of his disability, and as the court said in deciding the question (R. 45):

"The court must find upon the equitable defense that the plaintiff with knowledge of his rights and status under the war risk insurance policy and law, did not waive any right under the war risk insurance, and that the conversion of a part of the policy was done without any legal advice and pursuant to circular received by him from the agency of the defendant, calling his attention to the fact that the time when the change could be made was about to expire and that prompt action should be taken, * * *. If the plaintiff was at the time totally and permanently disabled within the intent and purview of the law under which the war risk insurance policy was issued, and such disability was reasonably certain to continue throughout his life, then the policy matured and he would not be bound by the conversion thereafter."

The plaintiff having gained nothing by the conversion and the defendant having lost nothing, the plaintiff is not estopped and what he did was not to seek a new contract from the defendant but merely to protect himself until such a time as it could be truthfully determined that his total disability was permanent. He made no election. He has made no claim against the defendant upon the converted policy and in fact upon the determination of the permanency of his con-

dition he lapsed his converted policy on January 1, 1928, and could not thereafter assert any liability of the defendant upon that policy.

The defendant in its brief has taken the inconsistent positions of asserting both that the converted policy herein is valid so as to estop the plaintiff and also that the defendant could not issue insurance to one who was permanently and totally disabled, as the jury found this plaintiff to be.

The defendant in its brief has cited but one case in support of its contention herein and that is the case of *Stevens vs. U. S.*, 29 Fed. (2d) 904. The facts in that case, however, are different from the facts in this, and upon the face of the decision it clearly appears that the claimant in that case *was not either totally or permanently disabled prior to the reinstatement* of his policy and therefore the reinstatement in that case was valid and the estoppel was an estoppel not by representation but by contract. It is clear that there can be no estoppel by contract where the contract is invalid, as in this case. Here, of course, the contract was clearly invalid and void *ab initio* because at the time the policy here was issued the event sought to be insured against had already happened. In the *Stevens* case the evidence of the doctors who testified for the plaintiff showed that prior to the time of trial

they did not think he was totally disabled and the plaintiff himself testified that he did not think he was totally disabled at the time of the reinstatement, whereas in the present case the doctors who testified for the plaintiff were in accord that his disability was both total and permanent and that it had been so since the accident he suffered while in the service and the subsequent diseases and operations which he had (R. 29-33). Further distinguishing the *Stevens* case we find that in that case the reinstated policy was still in force at the time of the trial and had never been repudiated by the insured and the court said:

"That plaintiff * * * was estopped to deny this basic fact (that he was not totally and permanently disabled) *so long as the contraact stood*" (Italics ours.)

And the rule is stated in 21 C. J. 1111, as follows:

"If, in making a contract the parties agree upon or assume the existence of a particular fact as the basis of their negotiations, *they are estopped to deny the fact so long as the contract stands* in the absence of fraud, accident or mistake."

That the *Stevens* case is not applicable here is clearly shown by the facts, first, that in this case the converted policy of insurance was no longer of any force and effect, and second, because the converted policy was based upon a mistaken fact, the permanency

of the plaintiff's total disability and further the court in the *Stevens* case found:

"That the plaintiff * * * elected to have his insurance reinstated upon the terms specified in the act permitting reinstatement."

In the present case the plaintiff acted under a mistake as to the permanency of his disability *and did not elect* to forfeit the rights under his war risk policy in favor of a contingent right under the converted policy, but rather he sought only to protect himself in the event his disability was not permanent; nor could there be any election in this case because, as was said in the case of *Bierce v. Hutchins*, 205 U. S. 340, 51 L. Ed. 828:

"Election is simply what its name imports; a choice between an overt oct, between two inconsistent rights, either of which may be asserted at the will of the chooser alone. * * * In all such cases the characteristic fact is that one party has a choice independent of the assent of anyone else."

In the present case the plaintiff had no inconsistent rights from which to choose. If his policy had matured he had no right to convert, and if it had not matured he had no right upon which to base a claim on the term insurance policy. There being then no inconsistent rights there could not have been an election, and as the Court said in the *Dobbie* case, *supra*:

"Her position in making the application and the representations in it was that of one *acting not upon*

election, but upon a hypothesis, and that, that hypothesis turning out to be incorrect, no estoppel can arise from it." (Italics ours.)

The plaintiff in this case, as in the *Dobbie* case, having acted merely upon an hypothesis, did not make an election, nor could he make an election, and "that hypothesis turning out to be incorrect, no estoppel can arise from it." The *Stevens* case expressly excludes the doctrine of the *Dobbie* case in its decision by distinguishing the same on the fact that the plaintiff in the *Dobbie* case did not intend to make an election. It further seems apparent that in the *Stevens* case the full $10,000 term insurance was reinstated, in which event the plaintiff would not be materially damaged by the enforcement of the reinstated policy rather than the term policy.

Here, however, as in the Larsen case, supra:

"The fact is, however, deceased had due $10,000, and the defendant seeks to satisfy it by the payment of $2,000, and in this the plaintiff would be greatly wronged. * * *, and *to prevail the defendant must clearly show that the issuance is free from mistake or illegality, perfectly fair, equal and just, not only in its terms but in the circumstances.*" (Itaalict ours.)

The defendant, therefore, having issued a void policy and having made a void contract, where they were obliged to ascertain the facts, must be estopped from asserting any representations made by the plaintiff

in procuring the contract, and there would be an estoppel against an estoppel, and both parties would then be free to assert the matters against which the estoppel has been urged. The doctrine is stated thus in 21 C. J. 1139:

"Where an estoppel exists against an estoppel the matter is set at large. It may happen that a plaintiff being estopped to allege a set of facts which the derendant is estopped to deny, the interestes of justice will require that both be liberated."

Under this doctrine the matters thus set at large would be evidence to be considered by the court or jury in determination of the fact.

If the court in this instance is to sustain the estoppel, and assuming the plaintiff in this case would have a right of action on his converted policy, then on the trial of such a cause the government could plead an avoidance by reason of the misrepresentations made in procuring the conversion, the jury having found as a fact that the plaintiff was totally and permanently disabled prior to the date of his conversion. That this is the attitude of the Bureau and that they would plead such an avoidance is conclusively shown by their action in the cases of *Thomas V. Russell vs. U. S.*, Numbers 12192½ and 20027, in the District Court for the Western District of Washington, Northern Division. In the first case, No. 12192½, the plaintiff claimed total and permanent disability from date of

discharge. The Government pleaded an estoppel by reason of a reinstatement made eight months after lapsation of the term policy. The case was dismissed before trial and subsequently it was refiled as case No. 20027, at which time the plaintiff claimed liability of the defendant on the reinstated policy, the full $10,000 having been reinstated. In answering this complaint the defendant has pleaded an avoidance of liability by reason of misrepresentation in procuring the reinstatement. There is one reported case somewhat similar, being the case of *Jensen vs. U. S.*, 29 Fed. (2d) 951. In that case the plaintiff claimed by his complaint liability against the Government on a reinstated policy and by its answer the defendant sought to avoid the policy by pleading the plaintiff was totally and permanently disiabled at the time of the reinstatement.

It is, therefore, submitted that this case is directly in point with the prior cases where the defense of estoppel has been denied, and in this case, as in those, no estoppel can apply for the reasons, first: that as in the *Dobbie* case the converted policy being based upon a hypothesis, which is incorrect, is void and no election has been made by the plaintiff; second: that because, as in the *Jenkins* case and the *Andrews* case, the plaintiff here had no right to convert and the defendant had no right to grant a conversion, and nothing

which the plaintiff did resulted in prejudice to the defendant or misled the defendant; and third: because as in the *Larsen* case, the plaintiff's rights under the term policy had become a liquidated claim prior to the conversion, and this claim can not be discharged except by payment in accordance with the terms of his contract.

III.

The next assignment of error in the defendant's brief is the refusal of the court to give defendant's requested instruction No. 7, as follows: (R. 48 and 49.)

"You are instructed further that if you find for the plaintiff he is not entitled to recover except upon five thousand dollars of war risk term insurance for the reason (48) that it is undisputed that effective January 1st, 1920, the plaintiff converted five thousand dollars term insurance to an ordinary life Government converted policy and that such conversion constituted a merger and novation of five thousand dollars of the term insurance originally applied for by the plaintiff. The plaintiff has not brought suit upon this converted contract of insurance and therefore is not entitled to any rights or benefits thereunder."

While the instruction was requested on the theory that the plaintiff's converted policy was valid and apparently that the plaintiff could recover on that instead of the original $10,000 term insurance which it substituted, still in the brief the defendant has urged

that it should have been given for the reason that otherwise plaintiff would have $15,000 insurance. The fallacy of this argument is apparent upon its face and it needs no discussion to show to this court that if the plaintiff recovered upon the original policy the converted policy would necessarily be void and no recovery could be had thereon. The defendant has urged that the converted policy is not void, but it is needless to cite to this court the numerous cases which hold that a policy of insurance is void where there is no risk which can be insured against. Here, of course, the jury's finding that the plaintiff was totally and permanently disabled prior to the conversion necessarily voids the converted policy since the event attempted to be insured against had already occurred. It is further urged in the defendant's brief that the converted policy must first be cancelled and the term policy restored. But this is unnecessary and, in fact, could not be done, since the term policy has matured prior to lapsation, by reason of which maturity the converted policy was void *ab initio* and a nullity, and the enforcement of the rights under the matured policy must necessarily involve a cancellation of the converted policy in fact, even though the converted policy could not exist in law. It is apparent, therefore, that the court committed no error in refusing this instruction.

For the reasons herein set forth and it appearing that there is no merit in any of the alleged assignments of error, it is submitted that the court did not err in entering judgment upon the verdict of the jury and that therefore the judgment must be affirmed.

Respectfully submitted,

W. G. BEARDSLEE,
GRAHAM K. BETTS,
Attorneys for Appellee.

No. L-10245

United States

Circuit Court of Appeals

For the Ninth Circuit

LOUIS BRANDAW, Guardian of the Estate and Person of Charles E. Brandaw, an incompetent,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF OREGON

DEMPSEY KIMSEY & DOWNS, PRINTERS

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

B. A. GREEN, 1003 Corbett Building, Portland, Oregon, and E. J. McALEAR, Hillsboro, Oregon,
For the Plaintiff in Error.

GEORGE NEUNER, United States Attorney, and FORREST LITTLEFIELD, Assistant United States Attorney, old Post Office Building, Portland, Oregon,
For the Defendant in Error.

DISTRICT COURT OF THE UNITED STATES OF AMERICA, DISTRICT OF OREGON

To George Neuner, United States Attorney for District of Oregon, GREETINGS:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to a notice of appeal filed in the Clerk's Office of the District Court of the United States for the District of Oregon, wherein Louis Brandaw, Guardian of the Estate and Person of Charles E. Brandaw, an incompetent, is appellant, and you are appellee, to show cause, if any there be, why the judgment in the said cause should not be corrected and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this 21st day of December, in the year of our Lord, one thousand nine hundred and twenty-eight.

R. S. BEAN, Judge.

Service accepted December 21, 1928, by Forrest E. Littlefield, Deputy United States Attorney.

In the District Court of the United States, for the District of Oregon.

November Term, 1927

BE IT REMEMBERED, that on the 10th day of November, 1927, there was duly filed in the District Court of the United States for the District of Oregon, a complaint, in words and figures as follows, to-wit:

In the District Court of the United States, for the District of Oregon.

LOUIS BRANDAW, Guardian of the Estate and Person of Charles E. Brandaw, an incompetent,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant complains and alleges:

I.

That the plaintiff is now the duly appointed and acting Guardian of the estate and person of Charles E. Brandaw, his appointment having been made by the Probate Court of the County of Washington, State of Oregon, and said plaintiff now resides in Washington County, in the State of Oregon, and said Charles E. Brandaw resides in Washington County, State of Oregon.

II.

That heretofore and upon the 25th day of August, 1918, said Charles E. Brandaw enlisted with the military forces of the United States of America and thereafter served in Company A, 76th Infantry, and thereafter upon the 21st day of October, 1918, was honorably discharged from said military forces.

III.

That while serving with the military forces of the United States of America said Charles E. Brandaw applied for and there was granted to him a policy of war risk insurance in the sum of Ten Thousand ($10,000.00) Dollars conditioned upon the fact that in case said Charles E. Brandaw became totally and permanently disabled said defendant promised and agreed to pay to Charles E. Brandaw the sum of $57.50 per month from the date of his permanent, total disability and continuing thru the same; and further conditioned that there should be paid to the beneficiaries named in said policy the sum of $57.50 for a period of 240 months in case of the death of said Charles E. Brandaw; all in consideration of said Charles E. Brandaw paying to said government the stipulated premiums as provided for by law.

IV.

That said policy remained in full force and effect until said Charles E. Brandaw was discharged from the military forces on October 21, 1918, and for a thirty day grace period thereafter, and said Charles E. Brandaw was at the time of his discharge from the said military forces permanently and totally disabled, in that he was at that time unable to continu-

ously follow a substantially gainful occupation, and it was then reasonably certain that this condition would prevail thruout his life, in that he was then, now is and will ever be disabled on account of suffering from epilepsy.

V.

That this plaintiff for said estate has made claim of said defendant for the payment of the amounts due pursuant to the terms and conditions of said policy and said defendant has disagreed with said plaintiff and has failed and refused and now fails and refuses to pay to said plaintiff the sums due under said policy.

WHEREFORE, plaintiff prays for judgment order and decree of this court that said Charles E. Brandaw was upon the date of his discharge from the military forces of the United States permanently and totally disabled and that judgment be entered in favor of the plaintiff and against the defendant in the sum of Six Thousand Two Hundred Ten Dollars ($6,210.00); and for plaintiff's costs and disbursements incurred herein.

HARE, McALEAR & PETERS,

B. A. GREEN,

Attorneys for the Plaintiff.

AND AFTERWARDS, to-wit: on the 16th day of January, 1928, there was duly filed in said court an answer, in words and figures as follows, to-wit:

[Title of Court and Cause.]

ANSWER

COMES NOW the United States of America, by George Neuner, United States Attorney for the District of Oregon, and J. N. Helgerson, Assistant United States Attorney, and for its answer to the amended complaint herein, admits, denies and alleges as follows:

I.

Answering the allegations in Paragraph I of plaintiff's complaint, the defendant herein neither admits nor denies the same, but prays that strict proof be required of the same.

II.

Answering the allegations in Paragraph II of plaintiff's complaint, the defendant admits the allegations of said Paragraph II.

III.

Answering the allegations in Paragraph III of plaintiff's complaint, the defendant admits that Charles E. Brandaw applied for and was granted war risk insurance in the amount of $10,000, payable in 240 installments of $57.50 per month in the event of death or permanent and total disability occurring while said insurance was in force, and the defendant hereby denies each and every other allegation con

tained in said Paragraph III, except the allegation herein expressly admitted.

IV.

Answering the allegations in Paragraph IV of plaintiff's complaint, the defendant admits that the said war risk insurance contract therein referred to was in force and effect at the time of plaintiff's discharge from the military forces of the defendant and the defendant hereby denies each and every other allegation contained in said Paragraph IV, except as expressly admitted herein.

V.

Answering the allegations in Paragraph V of plaintiff's complaint, the defendant denies the allegations of said Paragraph V, with the exception that it is admitted that a disagreement exists between the plaintiff and the United States Veterans Bureau relative to plaintiff's claim for said war risk insurance.

For a separate and further answer to the said complaint, the defendant herein alleges as follows:

I.

That plaintiff is barred from bringing this action by reason of the fact that plaintiff alleges in Paragraph II of said complaint that the said Charles E. Brandaw was honorably discharged from the military forces of the defendant on the 21st day of October, A. D. 1918, and further alleges in Paragraph IV of said complaint that at the time of his discharge said Charles E. Brandaw was permanently and totally disabled and therefore the date of the com-

mencement of this action was more than six years from the date that said Charles E. Brandaw was totally and permanently disabled.

WHEREFORE, defendant, having fully answered plaintiff's complaint, demands that plaintiff take nothing by this action and that the defendant recover of and from the plaintiff its costs and disbursements herein.

GEORGE NEUNER,
United States Attorney for the District of Oregon.

J. N. HELGERSON,
Assistant United States Attorney for Defendant.

AND AFTERWARDS, to-wit: on the 25th day of January, 1928, there was duly filed in said court a reply, in words and figures as follows, to-wit:

[Title of Court and Cause.]

REPLY

Comes now the plaintiff and for reply to the defendant's answer admits, denies and alleges:

I.

Denies each and every thing, allegation and matter in said answer and said further and separate answer contained, except as specifically alleged and set forth in plaintiff's complaint herein.

WHEREFORE, plaintiff having fully replied to defendant's answer, prays for judgment order and decree of this court that said Charles E. Brandaw was upon the date of his discharge from the military forces of the United States permanently and totally disabled, and that judgment be entered in favor of

the plaintiff and against the defendant in the sum of Six Thousand Two Hundred Ten ($6,210.00) dollars; and for plaintiff's costs and disbursements incurred herein.

HARE, McALEAR & PETERS,
B. A. GREEN,
Attorneys for Plaintiff.

AND AFTERWARDS, to-wit: on September 28th, 1928, the same being the 66th judicial day of the regular July term of said Court,—Present, the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

[Title of Court and Cause.]

RECORD OF VERDICT AND JUDGMENT

Now at this day come the plaintiff by Mr. B. A. Green of counsel, and the defendant by Mr. Forrest E. Littlefield, Assistant United States Attorney. Whereupon, the jury impaneled herein come into Court, answer to their names and return to the Court their duly sealed verdict, in words and figures as follows, viz:

"We, the jury duly impaneled to try the above entitled cause, do find for the defendant and against the plaintiff.

"Dated at Portland, Oregon, this 28th day of September, 1928.

LESTER D. KELLY, Foreman."

which verdict is received by the Court and ordered to be filed.

WHEREUPON, on motion of defendant for judgment upon said verdict,

IT IS ADJUDGED that plaintiff take nothing by this action, and that defendant go hence without day, and that said defendant do have and recover of and from said paintiff its costs and disbursements herein and have execution therefor.

WHEREUPON, on motion of plaintiff, IT IS ORDERED that said plaintiff be and is hereby allowed ten days from this date in which to file a motion for a new trial herein.

AND AFTERWARDS, to-wit: on the 5th day of October, 1928, there was duly filed in said court a motion for new trial in words and figures as follows, to-wit:

[Title of Court and Cause.]

MOTION FOR NEW TRIAL

Comes now the plaintiff and moves this Honorable Court for a new trial on the ground and for the reason, as follows:

I.

Errors of the Court occurring during the trial and in the instructions.

II.

Refusal of the Court to give Instruction No. VII of the plaintiff, as requested or in substance.

Dated this 4th day of October, 1928.

B. A. GREEN,
Of Attorneys for Plaintiff.

AND AFTERWARDS, to-wit: on the 5th day of November, 1928, the same being the 1st judicial day of the regular November term of said court—Present, the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

[Title of Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

This cause was heard by the Court on the motion for a new trial, and was argued by Mr. B. A. Green of counsel for plaintiff, and Mr. Forrest E. Littlefield, Assistant United States Attorney, upon consideration whereof, IT IS ORDERED that said motion be and the same is hereby denied.

AND AFTERWARDS, to-wit: on the 28th day of January, 1929, there was duly filed in said court a bill of exceptions in words and figures as follows, to-wit:

[Title of Court and Cause.]

BILL OF EXCEPTIONS

BE IT REMEMBERED that at the trial of this cause on the 28th day of September, 1928, the Honorable Robert S. Bean, Judge, presiding, the plaintiff appearing in person and by his attorneys, B. A. Green and E. J. McAlear, and the defendant appearing by Forrest E. Littlefield and William N. Rydalch, a jury was duly impaneled and the following proceedings were had:

Oscar Pfahl, the first witness produced on the

part of the plaintiff in his case in chief, upon direct examination testified in part as follows:

"Q. Do you know anything about this boy's ability to work or carry on before he went to the army?

A. Yes sir.

Q. What was that?

A. He would work around the farm just the same as any farm man would work.

Q. Was he strong, able-bodied, and husky?

A. Sure. He worked just as hard as any of the rest of the men out there.

Q. What work do you know of his having done subsequent to his discharge from the army?"

On cross examination, the witness testified in part as follows:

"Q. (By Mr. Littlefield): Mr. Pfahl, I believe you said that you had known Mr. Brandaw for about ten years and lived as neighbors there?

A. Yes, sir.

Q. Do you know whether or not he had any of these spells or seizures prior to entering the service?

MR. GREEN. Just a moment. I want to object to that, Your Honor, as under the law this man was conclusively held to have been in good physical condition, except as to defects and infirmities noted on his enlistment record, and I want to object to any such introduction of testimony, because the government accepts these men and issues this contract to them and they are bound by this contract, and I think that law is quite conclusive."

(Whereupon the matter was argued at length to the Court.)

"COURT: This contract, as I understand it, was an agreement on the part of the government that in case this soldier became totally and permanently disabled during the life of the contract it would pay him a certain sum of money. It is therefore incumbent upon the plaintiff to show that he did become totally and permanently disabled during the life of the contract, and unless it does so it certainly couldn't recover on this policy. I think it is competent for the government to show, if it can, that this trouble did not occur during the life of the contract. I don't understand that because the government accepted a man and issued a policy that it is to be conclusively presumed that the man was in sound health at the time the policy was issued so far as it bears upon his total and permanent disability. It must appear that he became totally and permanently disabled after the issuance of the policy, and I think this evidence is competent.

"MR. GREEN: The Court will allow an exception?"

Thereafter, the witness being interrogated testified that he had never heard of or seen any seizures which the plaintiff had prior to his entrance into the service.

II.

At the close of the testimony and before the argument of counsel, to the jury, plaintiff submitted to the court the following requested instruction:

"VII.

"You are instructed that under the law every enlisted man, or any other member employed in the active service under the war department or navy department, who was discharged prior to July 2, 1921, and who was in active service on or before November 11, 1918, shall be conslusively held and taken to have been in a sound condition when examined, accepted and enrolled for service, except as to defects, disorders and infirmities made of record in any manner by proper authorities of the United States at the time or prior to inception of active service. The law further provides that any ex-service man, who is shown to have had prior to January 1, 1925, a neuro-psychiatric disease, which developed a 10% degree of disability, shall be presumed to have acquired his disability in such service between April 6, 1917, and July 2, 1921, but said presumption shall be rebuttable by clear and convincing evidence. It is admitted that this man was suffering from neuro-psychiatric disease prior to January 1, 1925, and developed more than a 10% degree of disability from the date of his discharge and it is a question of fact for you to determine whether or not the presumption which the law provides has been rebutted in this case by clear and convincing evidence."

After argument of counsel to the jury, the Court instructed the jury as follows:

"Now, Gentlemen of the Jury, this, as you very well know by this time, is an action on one of the war insurance contracts. It is alleged and admitted that Brandaw entered the military service of the United

States on or about the 25th of August, 1918, and that thereafter and while in the service he took out a war risk policy in the sum of Ten Thousand Dollars, in which the Government agreed that if he would pay a certain premium per month it would pay him a certain stipend each month in case he should be totally and permanently injured during the lifetime of the policy. He remained in the service until the 21st of October, when he was honorably discharged. The premiums were paid on his policy for the month of October, 1918, and that continued it in force until the 30th of November of that year.

"On his behalf it is alleged and claimed that while this policy was in force, that is, sometime prior to the 30th of November, 1918, he became permanently and totally disabled, and the sole question for you to determine is, under this evidence, whether prior to that date he did become permanently and totally disabled.

"Now the Veterans' Bureau and the courts have defined the term 'permanent and total disability' as being an impairment of mind or body which renders it impossible for a person to continuously follow a substantially gainful occupation, provided that it is reasonably certain that this impairment will continue throughout his life. To be permanently and totally disabled within the meaning of this policy does not necessarily mean that a person must be bedfast or bedridden, and any attempt to work with inability to work being present does not necessarily negative a condition of permanent and total disability. The essence of the requirement is whether or not the assured suffered such an impairment of mind

or body which prevented him from continuously following a substantially gainful occupation, conditioned upon circumstances which made it reasonably certain that this condition would prevail throughout his life.

"If Brandaw was totally and permanently disabled after the issuance of the policy and any time prior to November 30th, 1918, there was no lapse in the policy. Under this contract between the Government and the assured it was stipulated that this policy should continue in force so long as assured paid the premium, so that the mere fact that Brandaw was discharged from the army would not of itself void this policy. He still had a right after his discharge to keep it alive by paying the premiums but he did not do so, and therefore it lapsed under its terms in November of 1918, and it is not of any consequence so far as his rights are concerned or the rights of the parties are concerned how long Brandaw served in the army. This policy is not made dependent upon the length of service in the army, and therefore the fact that Brandaw served only two months or that he did not go overseas is wholly immaterial, because the contract between him and the Government is that after his enlistment and after the contract was issued, if he should become totally and permanently disabled at any time during the lifetime of the policy he would be entitled to recover.

"Now there has been a question raised in this case as to Brandaw's condition at the time of his enlistment or the time that he was inducted into the army. I think it is fair to assume in the absence of evidence

to the contrary that he was at that time in good substantial health, because otherwise he would not have been inducted into the army, because they were looking for able and healthy young men, and when he was inducted into the army it is fair to assume that he was found to be in that condition, but if it should appear and you should believe from the testimony that prior to his induction into the army and prior to the issuance of the policy he was totally and permanently disabled so that he was not then able to continuously follow a gainful occupation it would necessarily follow that his disability could not have occurred after the issuance of the policy, and the Government would not be liable, because the terms and the conditions of the policy had not been broken, but if Brandaw had nothing more than what the doctors designated as a predisposition to a certain disease but it had not at that time developed so as to incapacitate him from continuously carrying on a gainful occupation, and after the issuance of the policy and while it was in force that disease developed to such an extent as to render him totally and permanently disabled it would be a violation of the terms of the policy and he would be entitled to recover. That is a question of fact for you to determine from the testimony in this case.

"There has been evidence here that Brandaw was receiving what is known as compensation from the Government, but that is a mere gratuity and has nothing whatever to do with the liability of the Government on these war risk contracts; it has no bearing on this case except so far as the rating given by the Bureau may assist in determining the extent and cause of his disability.

"I think that covers all the questions in this case, and it is a question of fact for you to say from the testimony whether you believe from a preponderance of the evidence that Brandaw became totally and permanently disabled or incapacitated during the lifetime of this policy. If you do think so, then you should find in favor of the plaintiff, and if you do not think so then you should find in favor of the Government. Swear the bailiffs, please.

(The bailiffs are sworn.)

"Now gentlemen, there are in this case two forms of verdict. One is in favor of the plaintiff, and if you find in his favor you will be kind enough to state in your verdict the date when you think he became permanently and totally disabled. If you do not think that he became totally and permanently disabled during the lifetime of the policy you will simply return a verdict in favor of the defendant. You may now retire."

(Jury retires at 3:40 P. M.)

Whereupon, after the jury had retired, the following proceedings were had:

"MR. GREEN: May it please the court, will the court grant me an exception to the refusal of the court to give requested instruction No. 7 in regard to the presumption.

THE COURT: Yes, I noted an exception.

MR. GREEN: Now, may it please the court there is one other question.

THE COURT: (Interrupting) I might say in reference to that exception—I don't know whether

it is available because it was not taken until after the jury retired.

MR. GREEN: I thought it was the practice not to make the exceptions in the presence of the jury.

THE COURT: Not in this court."

IT IS HEREBY CERTIFIED that the foregoing proceedings were had upon the trial in this cause and that this bill of exceptions contains all the evidence relative to or necessary to an understanding of the foregoing objections and exceptions.

IT IS FURTHER CERTIFIED that the foregoing exceptions in each case asked or taken by the plaintiff were allowed by the Court and that this bill of exceptions was duly presented and filed within the time fixed by law and the orders of ths court and is by me duly allowed and signed this 28th day of January, 1929.

ROBERT S. BEAN,
One of the Judges of the District Court of the United States for the District of Oregon.

O. K.:
B. A. GREEN,
Of Attorneys for Plaintiff.

AND AFTERWARDS, to-wit: on the 13th day of February, 1929, there was duly filed in said court a stipulation, in words and figures as follows, to-wit:

[Title of Court and Cause.]

STIPULATION

It is stipulated by and between B. A. Green, of attorneys for Plaintiff in Error, and Forrest E. Littlefield, of attorneys for Defendant in Error, that the Bill of Exceptions as heretofore settled and certified in said cause may be deemed amended by inserting in paragraph 11, at the close of the requested instruction Number VII, the following: "instruction refused—exception allowed."

Dated February 13th, 1929.

B. A. GREEN,
Of Attorneys for Plaintiff in Error.

FORREST E. LITTLEFIELD,
Of Attorneys for Defendant in Error.

IT IS SO ORDERED.

Dated this 15th day of February, 1929.

R. S. BEAN, Judge.

AND on the 21st day of December, 1928, there was duly filed in said court a petition for appeal, in words and figures as follows, to-wit:

[Title of Court and Cause.]

PETITION FOR APPEAL

The above named plaintiff, Louis Brandaw, Guardian of the Estate and Person of Charles E. Brandaw, an incompetent, conceiving himself aggrieved by the judgment filed and entered September 29, 1928, in the above-entitled cause and proceeding,

does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, for the reason and upon the grounds specified in the Assignment of Error filed herewith, and prays that his appeal may be allowed, that a citation issue, as provided by law, and that a transcript of the records, proceedings, exhibits and papers, upon which said judgment was entered, as aforesaid, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California; and this plaintiff prays for an order fixing the bond, which plaintiff shall give to secure to defendant the payment of costs, if said plaintiff should fail to sustain his contention in said appeal.

Dated this 21st day of December, 1928.

B. A. GREEN,
Of Attorneys for Plaintiff.

AND AFTERWARDS, to-wit: on the 21 day of December, 1928, there was duly filed in said court an assignment of errors, in words and figures as follows, to-wit:

[Title of Court and Cause.]

ASSIGNMENT OF ERRORS

The above-named plaintiff files this, as his assignment of errors and contends that the trial court erred in the following particulars in the trial of said cause.

I.

Failure of the Court to give the plaintiff's requested instruction No. VII, as requested, which said instruction is as follows:

"You are instructed that under the law every enlisted man, or any other member employed in the active service under the war department or navy department, who was discharged prior to July 2, 1921, and who was in active service on or before November 11, 1918, shall be conclusively held and taken to have been in a sound condition when examined, accepted and enrolled for service, except as to defects, disorders and infirmities made of record in any manner by proper authorities of the United States at the time or prior to the inception of active service. The law further provides that any ex-service man, who is shown to have had prior to January 1, 1925, a neuro-psychiatric disease, which developed a 10% degree of disability shall be presumed to have acquired his disability in such service between April 6, 1917, and July 2, 1921, but said presumption shall be rebuttable by clear and convincing evidence. It is admitted that this man was suffering from a neuro-psychiatric disease prior to January 1, 1925, and deveolped more than a 10% degree of disability from the date of his discharge and it is a question of fact for you to determine whether or not the presumption which the law provides has been rebutted in this case by clear and convincing evidence."

Dated this 21st day of December, 1928.

B. A. GREEN,
E. J. McALEAR,
Attorneys for Plaintiff.

AND AFTERWARDS, to-wit: on December 21st, 1928, the same being the 35th Judicial Day of the regular November term of said court—Present, the Honorable Robert S. Bean, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

[Title of Court and Cause.]

ORDER ALLOWING APPEAL

Upon motion of the plaintiff appearing by his attorney, B. A. Green.

IT IS ORDERED that the appeal of the plaintiff above named be allowed, as prayed for by the plaintiff in said cause.

AND IT IS FURTHER ORDERED that the amount of the bond be fixed at the sum of Five Hundred ($500.00) Dollars, as security for defendant's costs upon appeal.

AND IT IS SO ORDERED.

Dated this 21st day of December, 1928.

ROBERT S. BEAN, Judge.

AND AFTERWARDS, to-wit: on the 21st day of December, 1928, there was duly filed in said court an Undertaking on Appeal, in words and figures as follows, to-wit:

[Title of Court and Cause.]

UNDERTAKING ON APPEAL

KNOW ALL MEN BY THESE PRESENTS, that we, Louis Brandaw, Guardian of the Estate and

Person of Charles E. Brandaw, an incompetent, as principal, and the National Surety Company, a corporation, as surety, are held and firmly bound unto the United States of America in the sum of ~~Two Hundred Fifty ($250.00)~~ 500.00 Dollars to be paid, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, our heirs, executors and assigns.

WHEREAS, the plaintiff in the above-entitled cause has appealed to the United States Circuit Court of Appeals for the Ninth Circuit from a judgment rendered in the District Court of the United States, for the District of Oregon, which judgment was made and entered upon the 29th day of September, 1928, wherein and whereby Louis Brandaw, Guardian of the Estate and Person of Charles E. Brandaw, an incompetent, was plaintiff, and the United States of America was defendant.

NOW THEREFORE, the condition of this bond is such, that if the above plaintiff shall prosecute said appeal to effect and if plaintiff shall make good their plea and said judgment shall be reversed, then this obligation shall be void, otherwise to remain in full force and effect.

Dated this 21st day of December, 1928.

LOUIS BRANDAW, Guardian.
Principal.

NATIONAL SURETY COMPANY, a Corporation.
By ROBERT WHYTE, Surety.
Atty. in fact

The foregoing bond is hereby approved this 21 day of December, 1928.

R. S. BEAN, Judge.

AND AFTERWARDS, to-wit: on the 21st day of December, 1928, there was duly filed in said court, a Praecipe for Appeal in words and figures as follows, to-wit:

[Title of Court and Cause.]

PRAECIPE FOR APPEAL

To G. H. MARSH, Clerk of the above entitled Court:

Will you kindly prepare and transmit to the Clerk of the Circuit Court of Appeals of the Ninth Circuit sitting at San Francisco, California, the following documents:

a. Complaint.

b. Answer.

c. Reply.

c-1. Judgment.

d. Plaintiff's requested instruction No. VII.

e. Motion for a new trial.

f. Order denying motion for a new trial.

g. Record on appeal.

Dated this 21st day of December, 1928.

B. A. GREEN,
Of Attorneys for Plaintiff.

AND AFTERWARDS, and on the 13th day of February, 1929, there was filed in said court and cause a stipulation, in words and figures as follows, to-wit:

[Title of Court and Cause.]

STIPULATION

It is stipulated by and between B. A. Green, of attorneys for plaintiff in error, and Forrest E. Littlefield, of attorneys for defendant in error, that in printing the Abstract of Record in said cause that all titles of papers, acceptance of service and verifications may be omitted, save and except that the complaint shall bear the title of said cause.

Dated this 13th day of February, 1929.

B. A. GREEN,
Of Attorneys for Plaintiff in Error.

FORREST E. LITTLEFIELD,
Of Attorneys for Defendant in Error.

No. L-10245

United States

Circuit Court of Appeals

For the Ninth Circuit

LOUIS BRANDAW, Guardian of the Estate and Person of Charles E. Brandaw, an incompetent,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error

DEMPSEY KIMSEY & DOWNS, PRINTERS

No. L-10245

United States

Circuit Court of Appeals

For the Ninth Circuit

LOUIS BRANDAW, Guardian of the Estate and Person of Charles E. Brandaw, an incompetent,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Brief of Plaintiff in Error

DEMPSEY KIMSEY & DOWNS, PRINTERS

NAME AND ADDRESSES OF ATTORNEYS OF RECORD.

B. A. GREEN, 1003 Corbett Building, Portland, Oregon, and E. J. McALEAR, Hillsboro, Oregon,
For the Plaintiff in Error.

GEORGE NEUNER, United States Attorney, and FORREST LITTLEFIELD, Assistant United States Attorney, old Post Office Building, Portland, Oregon,
For the Defendant in Error.

In this brief, we hereinafter refer to the Plaintiff in Error as the plaintiff and to the Defendant in Error as the defendant.

This is an action upon a policy of War Risk Insurance, filed by Louis Brandaw, as guardian of the estate and person of Charles E. Brandaw, an incompetent, against the United States of America.

The complaint alleges jurisdictional residence; the entering of the military service of the United States on August 25, 1918, and honorable discharge therefrom October 21, 1918, and application for and issuance to him of the policy in the sum of Ten Thousand ($10,000.00) Dollars; the payment of the premiums provided by law, until his discharge; the lapse date of the policy, and the maturity of the policy by reason of permanent and total disability, and finally, the disagreement upon which this action is premised.

The answer is an admission of all allegations of the complaint save the maturity of the policy by reason of permanent and total disability. The answer further pleads the statute of limitations, but this plea is not at this time pertinent to the issues herein raised.

The case was tried September 29, 1928, before a jury. A verdict was returned in favor of the defendants and against the plaintiff. Plaintiff prosecutes this appeal and assigns as error the refusal of the trial court to give plaintiff's requested instruction Number VII.

The said requested instruction was:

> "You are instructed that under the law every enlisted man, or any other member employed in the active service under the war department or navy department, who was discharged prior to July 2, 1921, and who was in active service on or before November 11, 1918, shall be conclusively held and taken to have been in a sound condition when examined, accepted and enrolled for service, except as to defects, disorders and infirmities made of record in any manner by proper authorities of the United States at the time or prior to inception of active service. The law further provides that any ex-service man, who is shown to have had, prior to January 1, 1925, a neuro-psychiatric disease, which developed a 10% degree of disability shall be presumed to have acquired his disability in such service between April 6, 1917, and July 2, 1921, but said presumption shall be rebuttable by clear and convincing evidence. It is admitted that this man was suffering from a neuro-psychiatric disease prior to January 1, 1925, and developed more than a 10% degree of disability from the date of his discharge, and it is a question of fact for you to determine whether or not the presumption which the law provides has been rebutted in this case by clear and convincing evidence."

ARGUMENT

The sole question to be determined in this case is whether or not Chapter 10, Section 471, of Title 38, Page 219, United States Code Annotated, is applicable to this case.

The section reads as follows:

"Sec. 471. **Compensation for death or disability; to whom payable and for what causes payable; presumptions as to soundness of condition and time of acquisition of disabilities.** For death or disability resulting from personal injury suffered or disease contracted in the military or naval service on or after April 6, 1917, and before July 2, 1921, or for an aggravation or recurrence of a disability existing prior to examination, acceptance, and enrollment for service, when such aggravation was suffered or contracted in, or such recurrence was caused by, the military or naval service on or after April 6, 1917, and before July 2, 1921, by any commissioned officer or enlisted man, or by any member of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) when employed in the active service under the War Department or Navy Department, the United States shall pay to such commissioned officer or enlisted man, member of the Army Nurse Corps (female) or of the Navy Nurse Corps (female) or, in the discretion of the director, separately to his or her dependents, compensation as hereinafter provided; but no compensation shall be paid if the injury, disease, aggravation, or recurrence has been caused by his own willful misconduct; PROVIDED, that no person suffering from paralysis, paresis, or blindness shall be denied compensation by reason of willful misconduct, nor shall any person who is helpless or bedridden as a result of any disability be denied compen-

> sation by reason of willful misconduct. For the purposes of this section every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department who was discharged or who resigned prior to July 2, 1921, and every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department on or before November 11, 1918, who on or after July 2, 1921, is discharged or resigns, **shall be conclusively held and taken to have been in sound condition when examined**, accepted, and enrolled for service, except as to defects, disorders, or infirmities made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of active service, to the extent to which any such defect, disorder, or infirmity was so made of record. . . "

The law pertaining to relief for World War Veterans is in three parts, and is referred to as the World War Veterans Act. The law deals with one subject matter and one only, to-wit: the relief of World War Veterans.

We have copied above the plaintiff's requested instruction Number VII, and the instruction which the Court gave insofar as it may be material to this issue, was as follows:

> "Now there has been a question raised in this case as to Brandaw's condition at the time of his enlistment or the time that he was inducted into the army. I think it is fair to assume in the absence of evidence to the contrary that he was at that time in good substantial health, because otherwise he would not have been inducted into the army, because they were looking for able and healthy young men, and when he was

inducted into the army it is fair to assume that he was found to be in that condition, but if it should appear and you should believe from the testimony that prior to his induction into the army and prior to the issuance of the policy he was totally and permanently disabled so that he was not then able to continuously follow a gainful occupation it would necessarily follow that his disability could not have occurred after the issuance of the policy, and the Government would not be liable, because the terms and the conditions of the policy had not been broken, but if Brandaw had nothing more than what the doctors designated as a predisposition to a certain disease but it had not at that time developed so as to incapacitate him from continuously carrying on a gainful occupation, and after the issuance of the policy and while it was in force that disease developed to such an extent as to render him totally and permanently disabled it would be a violation of the terms of the policy and he would be entitled to recover. That is a question of fact for you to determine from the testimony in this case."

Plaintiff's requested instruction would have given plaintiff the benefit of the provision that he should be conclusively held to have been in sound physical condition upon the date of his enlistment. That every veteran is entitled to this presumption was held in the case of Jackson vs. United States of America, 24 Fed. (2) 981, Sections 1 to 3.

With like effect, we refer the Court to the case of United States vs. Eliasson, 20 Fed. (2) 851. In the Eliasson case, this same Court was called upon to determine whether or not an instruction under Section 200 of Title 2 of the World War Veterans Act of 1924, as amended by the Act of July 2, 1926, 44

Stat. 793, being the same section as quoted above, Chapter 10, Section 471, Title 38, U. S. Code Annotated, was applicable in a case involving a policy of War Risk Insurance. The Court held, in the Eliasson case, supra, that it was not error to have given an instruction premised upon the foregoing Section of the Act. The Eliasson case involved an element where there was a presumption that might be overcome by clear and convincing evidence. In this, the Brandaw case, we are dealing with a portion of the law which specifically says that the Veteran shall be **conclusively held** to have been in sound condition, etc., except as to defects noted on his enlistment record. In other words, in the Brandaw case, we are not dealing with a presumption, but we are dealing with a positive enactment that precludes any element of doubt.

This man was at the time of his discharge and now is an epileptic. The inception of his disability is not contested. That permanent and total disability existed at this time is not contested. He has been under guardianship throughout these years. The Court permitted the Government to introduce testimony, defendant's Exhibit 11, which left the defendant free to argue that the man was only in service two months; that his disability was congenital, and that it arose prior to his induction into the service. The Government accepted him as fit; he entered the service; he signed the contract for insurance; he paid the premiums provided by law, yet he is denied the benefits thereunder, under the instructions of the Court.

The Government should not be permitted to play

fast and loose with those who were willing and who did enter military service for the accomplishment of the ends sought by this Government. Jagoding vs. United States of America, 295 Fed. 915.

We submit that under the ruling in the Eliasson case, supra, the Court should have given this requested instruction, and for this manifest error the cause should be remanded for a new trial.

Respectfully submitted,

B. A. GREEN,
E. J. McALEAR,
Attorneys for Plaintiff in Error.

No. 5748

In the United States Circuit Court of Appeals

For the Ninth Circuit

LOUIS BRANDAW, Guardian of the Estate and Person of Charles E. Brandaw, an incompetent,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Upon Appeal from the United States District Court for the District of Oregon.

Brief of Defendant in Error

Names and Addresses of Attorneys of Record:

GEORGE NEUNER,
United States Attorney for the District of Oregon.

FRANCIS E. MARSH,
Assistant United States Attorney.
Attorneys for Defendant in Error.

B. A. GREEN,
Attorney for Plaintiff in Error.

The Adam Printing Co., Portland, Ore. 5-14-29 40

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No. 5748

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vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Upon Appeal from the United States District Court for the District of Oregon.

Brief of Defendant in Error

Names and Addresses of Attorneys of Record:
GEORGE NEUNER,
United States Attorney for the District of Oregon.
FRANCIS E. MARSH,
Assistant United States Attorney.
Attorneys for Defendant in Error.
B. A. GREEN,
Attorney for Plaintiff in Error.

FACTS

In addition to the facts set forth in the brief of the plaintiff in error, we wish to call attention to other facts we deem important. Hereafter plaintiff in error will be referred to as the plaintiff and the defendant in error as the defendant.

The pleadings show that the insured, Charles E. Brandaw, was in the army but a short time from August 25, 1918, until October 21, 1918, and that his insurance was not in effect after November 30, 1918. The only issue tried was whether or not Brandaw became permanently and totally disabled while his policy was in effect, namely from August 28, 1918, until November 30, 1918.

The evidence was to the effect that at the time of plaintiff's enlistment, he was examined and apparently was in sound physical condition. That a few days after he was in the service he suffered a fit of epilepsy and was immediately given a thorough examination and a complete history taken relative to his disease. His trouble was diagnosed as congenital epilepsy and his history evidenced this condition for many years. Shortly after this examination he was discharged from service because of being physically unfit and he immediately let his insurance lapse. This evidence is borne out by defendants "Exhibit No. 2," the original of which is a part of the record on this appeal. This

exhibit was introduced without any objection on the part of the plaintiff. Hence there was evidence before the jury relative to Brandaw's condition prior to his enlistment.

Also during the trial of this action the plaintiff voluntarily introduced testimony relative to Brandaw's physical condition and his ability to work prior to his enlistment in the army. (Tr. 17.)

The plaintiff requested his instruction No. 7, which is found on page 19 of the transcript and the Court refused to give the same. After the Court had instructed the jury and the jury had retired for deliberation the plaintiff took exception to the refusal of the Court to give his requested instruction No. 7. The Court noted the exception after the jury had retired for deliberation. (Tr. 23 and 24.)

Plaintiff's sole contention on this appeal is that the Court erred in refusing to give his requested instruction No. 7, which he contends he was entitled to by virtue of Section 471 of Title 38, Page 219, U. S. C. A., the same being a section of the World War Veterans Act.

POINTS AND AUTHORITIES

I.

Section 471 of Title 38, Page 219, U. S. C. A., relates to compensation and not war risk insur-

ance and, therefore, this section does not entitle the insured in an action on a war risk insurance policy to an instruction, as requested by the plaintiff, that every enlisted man, or any other member employed in the active service under the War Department or Navy Department, who was discharged prior to July 2, 1921, and who was in active service on or before November 11, 1918, shall be conclusively held and taken to have been in a sound condition when examined, accepted and enrolled for service, except as to defects, disorders, and infirmities made of record in any manner by proper authorities of the United States at the time or prior to inception of active service.

Steve Oliver vs. United States—District of Arizona (Not Reported).

II.

An exception taken to the Court's refusal to give a requested instruction after the jury has retired will not be considered on appeal.

Brevard Tannin Co. v. J. F. Mosser Co., 288 Fed. 725;

New York Life Insurance Co. vs. Slocomb, 284 Fed. 810, 9th Cir.

Joyce et al. vs. United States, 294 Fed. 665, 9th Cir.;

Fasulo vs. United States, 7 Fed. (2nd) 961, 9th Cir.;

Phelps vs. Mayer, 15 How. 161, 14 L. Ed. 643.

ARGUMENT

I.

It is the contention of the defendant that Section 471, supra, applies only to compensation and not to war risk insurance.

Section 471, after stating that compensation will be paid for death or disability suffered or contracted in the service, provides:

> "**For the purposes of this section** every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department, who was discharged or who resigned prior to July 2, 1921, and every such officer, enlisted man, or other member employed in the active service under the War Department or Navy Department on or before November 11, 1918, who on or after July 2, 1921, is discharged or resigns, shall be conclusively held and taken to have been in sound condition when examined, accepted, and enrolled for service, except as to defects, disorders, or infirmities made of record in any manner by proper authorities of the United States at the time of, or prior to, inception of active service, to the extent to

which any such defect, disorder, or infirmity was so made of record."

"For the purposes of this Section" relates to compensation.

This section provides that the enlisted man is conclusively held and taken to have been in sound condition when examined, accepted and enrolled for service, and does not say he is conclusively held and taken to have been in sound condition when granted war risk insurance.

The World War Veterans Act is divided into several subdivisions. Part II thereof relates to Compensation and Treatment. Part III thereof relates to Insurance. Section 471 is under the head of Compensation. Compensation is a gratuitous benefit and Congress enacted laws to govern the director in the payment of claims for compensation. War Risk Insurance is a contractual relation and the contract is the only thing binding on the parties thereto. Congress has passed no laws regarding the payment of insurance, except to authorize the issuance of such insurance policies, whereby the Government in consideration for premiums paid, agrees to pay the insured a stipulated monthly sum in the event of his becoming totally and permanently disabled while the contract is in effect, or in case of the death of the insured, such payments to go to his beneficiary.

Section 471 is not written into the insurance contract nor is it made part of the contract by any law and examination of said section shows it to be inconsistent with the terms of the contract of War Risk Insurance.

This contract of insurance provides that before the insured is entitled to the benefits under the policy, he must become permanently and totally disabled, while his policy is in effect. There is no question that if the jury found that insured became totally and permanently disabled after his policy expired, he could not recover. Why is it not equally true that insured would not be entitled to recover if he was found to have been permanently and totally disabled prior to taking out his insurance? Insurance is an indemnity against a future loss and not against one which has already occurred.

Defendant admits that if insured was ill prior to taking out his insurance, but not permanently and totally disabled at that time, and later became totally and permanently disabled while his insurance was in effect even from the illness he suffered, the insured would be entitled to recover. Such is the holding in the cases of Jackson vs. United States, 24 Fed. (2nd) 981, and Jagodnigg vs. United States, 295 Fed. 915, cited by plaintiff, but these cases are not analogous to the case at bar.

We recognize the fact that any medical examination of Brandaw made prior to granting him the insurance, which indicated that insured was in a sound condition would be competent evidence, but not conclusive evidence, and not particularly so if later medical examinations showed a history of a long standing disability. Doctors and physicians are not infallible and mistakes are made.

This case is a good example. At the time Brandaw enlisted, he appeared to the army doctors as being in a sound condition. His epilepsy was not apparent as he suffered from no seizures during the examination. But within a few days after enlistment he had a fit of epilepsy and then a history of his case was taken and the evidence shows he was in the same physical condition for years prior to his enlistment as he was during the short period of two months he was in the service.

The Court's instructions were fair to the plaintiff. The Court states:

> "I think it is fair to assume in the absence of evidence to the contrary that he (Brandaw) was at the time (when he enlisted) in good substantial health, because otherwise he would not have been inducted into the army, because they were looking for able and healthy young men, and when he was inducted into the army

it is fair to assume that he was found to be in that condition."

The Court then goes on to instruct that:

"If it should appear and you should believe from the testimony that prior to his induction into the army and prior to the issuance of the policy, he was totally and permanently disabled so that he was not then able to continuously follow a gainful occupation, it would necessarily follow that his disability could not have occurred after the issuance of the policy and the Government would not be liable because the terms and the conditions of the policy had not been broken."

We contend that this instruction correctly states the law in construing a contract of War Risk Insurance. In the case of Steve Oliver vs. United States of America, recently tried by Judge F. C. Jacobs in the United States District Court for the District of Arizona, the Court in directing a verdict for defendant, stated:

THE COURT: Gentlemen, at the close of the evidence of the plaintiff yesterday evening, a motion was made by the defendant for an instructed verdict in favor of the defendant upon three different grounds and the court denied the motion. The third ground of the

motion was that the evidence failed to show that the plaintiff had suffered any loss since the issuance of this insurance policy and, upon reconsideration of that question, the court is satisfied that it was in error, judging the case from all the evidence that has been introduced by the plaintiff and the burden is always on the plaintiff to establish its case by a preponderance of the evidence and I am about to enter an order vacating the ruling on the motion for an instructed verdict. You may enter such an order, Mr. Clerk, and I find that it becomes my duty, under the law and the evidence of this case, to instruct this jury to return a verdict in favor of the defendant, for the reason that the evidence fails to disclose a loss suffered by this plaintiff subsequent to the issuance of the policy. The evidence, in my judgment, shows that the plaintiff is in the same condition today that he was at the time that the policy was issued. The evidence of Dr. Allen was very clear and distinct on that. The evidence of Dr. McNally is to the effect that light employment would probably cure this plaintiff of the ailment existing prior to and at the time of the issuance of this policy and this does not preclude the plaintiff from subsequently bringing an action on the policy,

if he suffers a total and permanent disability from any cause arising subsequent to the 1st of November, 1925. You may submit that verdict to one of the jury and one of you gentlemen may sign that and return it."

This case is not reported. Judge Jacobs took the same view as Judge Bean did in this case.

We are unable to find any Circuit Court of Appeals cases deciding the question whether or not Section 471 relates to insurance as well as compensation, but logical reasoning brings us to the conclusion that it does not. One case cited by plaintiff, namely: United States vs. Eliason, 20 Fed. (2nd) 821, does deal with another feature of Section 471, but that case does not say that the insured is entitled to the instruction as contended by plaintiff here. The facts in the Eliason case would warrant such an instruction as given by the trial court in that case, even in the absence of Section 471. The court decided that the instructions were not erroneous in view of the facts and did not decide that Section 471 entitled the insured to such instruction in all cases.

We submit that on the merits the instructions in the instant case were correct and that the Court's refusal to give the instruction No. 7, as requested, was not error.

II.

The plaintiff is not entitled to the exception taken to the refusal of the Court to give his requested instruction No. 7, because he did not take the exception before the jury retired for deliberation.

Page 23 of the Transcript shows what procedure was had relative to this exception. We contend, as indicated by the trial court, that this exception is not available. The Court stated:

> "I might say in reference to that exception —I don't know whether it is available because it was not taken until after the jury retired."

This Circuit has followed the rule as laid down in the case of Brevard Tannin Co. vs. J. F. Mosser Co., 288 Fed. 725, by Chief Justice Taft, wherein the Court stated:

> "It has further been held that an exception taken after the jury retired cannot be considered on a writ of error under the Federal practice, even if counsel are lulled into not taking exceptions while the jury is at the bar, either by stipulation, by the Court's granting permission to them to do so, or by an invariable practice in the trial court well known and acted upon by counsel."

In the case of Joyce et al. vs. United States, 294 Fed. 665, in this Circuit, this Court said:

> "The proper practice in federal courts is very simple and definitely established. From the time of the decision in Phelps vs. Mayer, 15 How 161, 14 L. Ed. 643, following the common law rule, it has been held that it must appear by the transcript that the party who complains of the refusal to instruct as requested, excepted to the refusal while the jury were at the bar."

See also New York Life Insurance Co. vs. Slocomb, 284 Fed. 810, and Fasulo vs. United States, 7 Fed. (2nd) 961, both being Ninth Circuit cases.

We submit that no error was committed by the trial court and that the exception was not well taken and, therefore, the judgment should be affirmed.

Respectfully,

GEORGE NEUNER,
United States Attorney for the
District of Oregon;
FRANCIS E. MARSH,
Assistant United States Attorney,
Attorneys for Defendant.

No. 5748

In the United States Circuit Court of Appeals for the Ninth Circuit

LOUIS BRANDAW, GUARDIAN OF THE ESTATE AND PERSON OF CHARLES E. BRANDAW, AN INCOMPETENT, PLAINTIFF IN ERROR,

v.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

PETITION FOR REHEARING

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 5748

LOUIS BRANDAW, GUARDIAN OF THE ESTATE AND PERSON of Charles E. Brandaw, an Incompetent, plaintiff in error,

v.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

PETITION FOR REHEARING

To the Honorable The United States Circuit Court of Appeals for the Ninth Circuit:

Comes now the Defendant in Error by George Neuner, United States Attorney for the District of Oregon, and petitions the Court to grant it a rehearing in the above-entitled cause, upon the grounds hereinafter stated, which, notwithstanding the seeming directness of their presentation, counsel begs the Court to accept as submitted with the highest deference and respect.

The facts briefly stated are: Charles E. Brandaw enlisted in the Army August 25, 1918, and was discharged October 21, 1918. On August 28, 1918, Brandaw applied for and was granted $10,000 war-risk term insurance on which premiums were paid through the month of October, 1918. In the petition filed on or about November, 1927, it was alleged that the insured became permanently and totally disabled on October 21, 1918, on account of epilepsy. The defendant admitted the granting of the insurance but denied that Brandaw was permanently and totally disabled on October 21, 1918. After trial the case was submitted to the jury who returned a verdict finding generally for the defendant and against the plaintiff, on which judgment for the defendant and against the plaintiff was entered. (R. 14, 15.)

The plaintiff's only Assignment of Error is the failure of the Trial Court to give a requested instruction as follows:

> You are instructed that under the law every enlisted man, or any other member employed in the active service under the war department or navy department, who was discharged prior to July 2, 1921, and who was in active service on or before November 11, 1918, shall be conclusively held and taken to have been in a sound condition when examined, accepted, and enrolled for service, *except as to defects, disorders, and infirmi-*

> *ties made of record in any manner by proper authorities of the United States at the time or prior to inception of active service.* The law further provides that any ex-service man, *who is shown to have had* prior to January 1, 1925, a neuropsychiatric disease, which developed a 10% degree of disability, shall be presumed to have acquired his disability in such service between April 6, 1917, and July 2, 1921, but said presumption shall be rebuttable by clear and convincing evidence. It is admitted that this man was suffering from neuropsychiatric disease prior to January 1, 1925, and developed more than a 10% degree of disability from the date of his discharge and it is a question of fact for you to determine whether or not the presumption which the law provides has been rebutted in this case by clear and convincing evidence. (Italics ours.) (R. 19.)

The Bill of Exceptions (R. 16, 17, 18) discloses that one Oscar Pfahl, testifying for the plaintiff, was questioned on direct examination as to Brandaw's capacity and ability to work before he entered military service, and that all of his answers to the questions propounded were in effect that Brandaw could and did work. On cross examination the witness Pfahl was asked:

> Do you know whether or not he had any of these spells or seizures prior to entering the service?

To this question counsel for plaintiff objected, and, after being overruled, the witness testified:

> *That he had never heard of or seen any seizures which the plaintiff had prior to his entrance into the service.* (R. 17, 18.)

After the jury had retired the plaintiff's attorney asked for an exception to the refusal of the Court to give the requested instruction about which this appeal revolves (R. 23) and was apprised by the Court that it was *not* the practice *not* to make exceptions in the presence of the jury in that Court, or, stated in the affirmative, that it was the practice that exceptions must be made before the jury retired.

The Bill of Exceptions goes no further into the testimony.

CONTENTIONS OF DEFENDANT IN ERROR UPON REHEARING

The contentions of the defendant in error, if a rehearing is granted, will be as herein set forth, and the reasons for granting a rehearing will be elaborated in the statement of the argument:

1. The requested instruction was immaterial.
2. The plaintiff did not timely except to the Court's refusal to give the requested instruction.

STATEMENT OF ARGUMENT

I

The only testimony contained in the Bill of Exceptions in this Record as to Brandaw's physical condition at the time he enlisted in the service is

that he was in good physical condition, was able to, and did work. Further, it was shown by defendant's exhibit No. 2 that Brandaw when enlisted was, so far as the record of examination shows, in sound physical condition. That the Trial Court considered that there was no evidence to the contrary is the only inference which may be drawn from that part of the Court's charge, as follows:

> I think it is fair to assume in the absence of evidence to the contrary that he was at that time (enlistment) in good, substantial health, * * * and when he was inducted into the Army it is fair to assume that he was found to be in that condition. (R. 21, 22.)

Assuming for the moment that the plaintiff was entitled to the requested instruction about which he complains, it is submitted that that instruction was fully given in substance as above quoted. Further, since Brandaw to recover must have shown that permanent and total disability ensued at some time subsequent to the date of application, August 28, 1918, and before the expiration of the grace period, November 30, 1918, it is difficult to perceive the probative value of plaintiff's requested instruction. The request for instruction might as well have dated back to the birth of Brandaw with the request that he then be presumed to have been physically sound, for even though he was presumed sound at date of enlistment, the evidence before the jury which prompted them to return a general verdict

for the defendant may well have been, first, that Brandaw became permanently and totally disabled at some time after enlistment and before application for insurance; or, second, that he was not permanently and totally disabled either before enlistment, after enlistment, or after application and within the life of the policy. The record is, of course, silent as to the basis on which the jury's verdict is founded.

This Court said, through Judge Dietrich, in the case of *United States* v. *Per Eliasson,* 20 Fed. (2d) 821:

> The question being, did plaintiff become "totally and permanently disabled" prior to August 1, 1919, our concern is with the effects rather than with the germinal origin of any disease with which he may have been afflicted. It would therefore seem to be immaterial that he acquired the germ during the term of the insurance where, as here, it conclusively appears that if so acquired it did not operate seriously to impair his physical or mental capacity until three years after the insurance expired. But if we assume that the instruction upon the point might properly have been withheld, I am unable to see how the giving of it could have been prejudical. The court clearly advised the jury that only in case they were convinced by the evidence of plaintiff's total and permanent disability during the insur-

> ance term would they be warranted in finding for him; and this view was emphasized by repetition. Attention was thus effectively drawn to the controlling issue of plaintiff's actual physical condition at the time the insurance terminated, and upon that issue I agree that under the accepted definitions of "total" and "permanent" disability as set forth in the instructions, the case was one for the jury.

Likewise, in the present case the Trial Court in his instructions made plain that the issue was whether or not Brandaw became permanently and totally disabled within the life of the contract as follows:

> * * * On his behalf it is alleged and claimed that while this policy was in force; that is, some time prior to November 30, 1918, he became permanently and totally disabled, and the sole question for you to determine is, under this evidence, whether, prior to that date, he did become permanently and totally disabled. * * * If Brandaw was totally and permanently disabled after the issuance of the policy and any time prior to November 30, 1918, there was no lapse in the policy. * * * This policy is not made dependent upon the length of service in the army, and * * * if he should become totally and permanently disabled at any time during the lifetime of the policy he would be entitled to recover.

In addition, it is difficult to perceive where the refusal to give the requested instruction in this case constitutes prejudicial error when the giving of a like instruction or similar instruction in the Eliasson case was deemed not to constitute prejudicial error because immaterial. The issue in this case is whether or not the plaintiff became permanently and totally disabled on or after August 28, and before November 30, 1918. His physical condition at the time of enlistment on August 25, 1918, is clearly immaterial to the issue thus presented and it is submitted that no reversible error could be committed by refusal to give instruction concerning his condition at that time.

This case is strikingly similar to the case of *James W. Jordan* v. *United States,* No. 5916, decided by this Court on November 12, 1929. Judge Rudkin, writing the opinion, said:

> The court instructed the jury, in effect (as the Trial Court in the Brandaw case did), that if the plaintiff suffered from epilepsy and was totally and permanently disabled between the date of his entry into the military service of the United States and the dates of issuance of the policies, their verdict should be for the defendant. The jury returned a general verdict for the defendant, accompanied by two special interrogatories, finding that the plaintiff was permanently and totally disabled from epilepsy between

the date of his entry into the military service of the United States and the date of the two contracts of insurance. Upon the general verdict and the special findings, a judgment was entered in favor of the defendant.

"If the appellant became totally and permanently disabled after his entry into the military service of the United States and before applications for the policies in suit were made, and before the policies issued, the charge of the court was correct, because a policy of insurance does not ordinarily cover a loss already suffered." (Citing 31 opinions Atty. Gen. 534.)

Since it is clear that the only evidence in the present case showed that Brandaw was in sound condition when he was enlisted, it logically follows that the general verdict of the jury must have been on the basis:

(1) That he was permanently and totally disabled before he applied for insurance and therefore suffered no loss under the policy, or (2) that he was not permanently and totally disabled at any time prior to November 30, 1918.

II

On the question of timeliness of plaintiff's exception to the Court's refusal to request as instructed we respectfully urge upon the Court that the record seems plain that no exception was taken by the plaintiff until after the jury retired, as ap-

pears from the following colloquy between plaintiff's counsel and the court (R. 23, 24):

> Whereupon, *after the jury had retired,* the following proceedings were had:
>
> Mr. GREEN. May it please the court, will the court grant me an exception to the refusal of the court to give requested instruction No. 7 in regard to the presumption?
>
> The COURT. Yes; I noted an exception.
>
> Mr. GREEN. Now, may it please the court, there is one other question.
>
> The COURT (interrupting). I might say in reference to that exception—I don't know whether it is available *because it was not taken until after the jury retired.*
>
> Mr. GREEN. I thought it was the practice not to make the exceptions in the presence of the jury.
>
> The COURT. Not in this court. (Italics ours.)

It is, therefore, respectfully submitted that upon this state of the record the question as to the correctness or incorrectness of the Trial Court's refusal to give the requested instruction has not been properly presented on appeal for consideration before this Court under the authority of the case of *Brevard Tannin Co.* v. *J. F. Mosser Co.,* 288 Fed. 725, and other cases cited in the Government's brief.

For the reasons stated, the defendant in error respectfully prays this Court to grant a rehearing of the cause, and to the end thereof restore the same

to the calendar for oral argument at such time and under such terms and conditions as to the Court may seem fit.

Respectfully submitted.

GEORGE NEUNER,
United States Attorney.

JAMES T. BRADY,
Attorney, U. S. Veterans' Bureau.

I certify that the foregoing petition is, in my opinion, well founded, and is not made for the purposes of delay.

GEORGE NEUNER,
United States Attorney.

U. S. GOVERNMENT PRINTING OFFICE: 1929

No. 5751

United States
19
Circuit Court of Appeals

For the Ninth Circuit.

KARL HERTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 5751

United States
Circuit Court of Appeals
For the Ninth Circuit.

KARL HERTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Montana.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

LESTER H. LOBLE, Esq., and HUGH R. ADAIR, Esq., Both of Helena, Montana,
Attorneys for Appellant.

W. D. RANKIN, Esq., U. S. Attorney, of Helena, Montana,
Attorney for Appellee.

In the District Court of the United States in and for the District of Montana.

No. 4862.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

CARL HERTER,
Defendant.

BE IT REMEMBERED, that on November 1, 1928, an information was filed herein which is in the words and figures following, to wit: [1*]

*Page-number appearing at the foot of page of original certified Transcript of Record.

District Court of the United States, District of Montana, Helena Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CARL HERTER,

Defendant.

INFORMATION.

BE IT REMEMBERED, that L. V. Ketter, Assistant United States Attorney for the District of Montana, on behalf of the United States, comes into the District Court of the United States for the District of Montana, and informs the Court on this —— day of ————, 1928:

FIRST COUNT.

(Possession.)

That on or about the 5th day of October, 1928, one Carl Herter, whose true name is to the informant unknown, at and within that certain building located at 34 North Benton Avenue, in the city of Helena, county of Lewis and Clark, in the State and District of Montana, and within the jurisdiction of this Court, did then and there wrongfully and unlawfully have and possess intoxicating liquor, to wit, whiskey, wine and beer, the exact quantity and character of which are to the informant unknown, intended for use in violation of the National Prohibition Act; contrary to the form of the Statute

in such case made and provided, and against the peace and dignity of the United States of America. [2]

SECOND COUNT.

(Nuisance.)

And the informant aforesaid further gives the Court to understand and be informed:

That on or about the 5th day of October, 1923, one CARL HERTER, whose true name is to the informant unknown, at and within those certain premises described in Count One hereof, did then and there wrongfully and unlawfully maintain a common nuisance, that is to say, a place where intoxicating liquor was possessed and kept in violation of Title II of the National Prohibition Act; contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States of America.

L. V. KETTER,
Assistant United States Attorney for the District of Montana. [3]

District Court of the United States of America,
District of Montana.

L. V. Ketter, being first duly sworn, on oath, deposes and says:

That he is a duly appointed, qualified and acting Assistant United States Attorney for the District of Montana, and as such makes this verification to the foregoing information; that he has read the said information and knows the contents thereof,

and that the same is true to the best of his knowledge, information and belief.

L. V. KETTER.

Subscribed and sworn to before me this 1st day of November, 1928.

[Seal] H. H. WALKER,

Deputy Clerk, U. S. District Court, District of Montana.

[Endorsed on back]: No. 4862. In the District Court of the United States for the District of Montana, Helena Division. United States of America vs. Carl Herter. Information. Filed Nov. 1, 1928. On $300.00 bond. [4]

THEREAFTER on January 26, 1929, the following order was made herein, the minute entry thereof being as follows to wit:

(Title of Court and Cause.)

MINUTES OF COURT—JANUARY 26, 1929—
ORDER CONTINUING HEARING.

At this time Hugh Adair, Esq., attorney for defendant, called up and presented to the Court defendant's petition to suppress the evidence in above case, whereupon the District Attorney stated he would like further time to consider such petition and asked that it be continued until the day of trial. Thereupon Court ordered that hearing of said petition be continued accordingly.

Entered in open court Jan. 26, 1929.

C. R. GARLOW,
Clerk. [5]

THEREAFTER, on January 29, 1929, defendant was duly called for arraignment, plea and trial, the minute entry thereof, together with the verdict of the jury and the judgment of the Court being as follows, to wit:

(Title of Court and Cause.)

MINUTES OF COURT—JANUARY 29, 1929—TRIAL.

Defendant was duly called for arraignment, plea and trial this day, said defendant being present with his attorney, Hugh Adair, Esq., and the District Attorney appearing for the United States.

Thereupon Mr. Adair called up defendant's petition to suppress the evidence herein and moved that the same be heard before the arraignment, plea and trial of defendant, whereupon the Court ordered that said motion be denied, to which ruling of Court defendant then and there excepted, and exception duly noted.

Thereupon defendant entered a plea of not guilty.

Thereupon Mr. Adair stated to the Court that before a jury is empanelled he would like to have defendant's motion or petition heard, and that the petition is in the nature of a plea in abatement, whereupon the Court stated that taking it as a plea in abatement it is denied. Mr. Adair then

asked that it be considered as a motion to suppress, whereupon Court ordered that as such it be denied at this time but that it will be heard during the trial of the case, to which rulings of the Court the defendant then and there excepted and exception duly noted.

Thereupon the following persons were duly empanelled, accepted and sworn as a jury to try the cause, viz.: John Wendel, Paul P. Rafferty, R. J. Johannes, Emil F. Walter, E. G. Hardesty, James W. Shannon, E. K. Preuitt, Harry B. Schaffer, T. C. Patrick, Samuel Erickson, A. G. Anderson, and John Adami, Jr.

Thereupon Paul Read was sworn as a witness for the United States, whereupon defendant objected to the introduction of any evidence for the reason that the search-warrant herein was ordered quashed by the United States Commissioner, and that the search of defendant's premises was illegal and that no probable cause existed for the issuance of the search-warrant. Thereupon Court ordered that said objection be overruled, to which ruling of the Court defendant then and there excepted, and exception duly noted. Thereupon Paul Read testified as a witness for the United States, and Orville Jones, J. Q. Adams, and H. D. Dibble were sworn and examined as witnesses for the United States, whereupon the United States rested.

Thereupon the defendant offered in evidence the original search-warrant, the order made by Judge Pray transmitting certain papers back to the United States Commissioner, and the findings of

the United States Commissioner quashing the search-warrant, to which offer the District Attorney objected, whereupon Court ordered that the objection be sustained, the exception of defendant to the ruling of the Court being noted.

Thereupon defendant moved the Court to direct the jury to return a verdict of not guilty herein for lack of proof, which motion was by the Court denied and the exception of defendant noted. Thereupon defendant rested.

Thereupon, after the arguments of counsel and the instructions of the Court the jury retired to consider of its verdict, the exception of defendant to certain portions of the instructions given by the Court being noted.

Thereafter the jury returned into court with its verdict, which verdict was received by the Court, ordered read and filed, and by the jury acknowledged to be its true verdict, being as follows, to wit: [6]

> "We, the jury in the above entitled cause, find the defendant guilty in manner and form as charged in the information on file herein as to counts 'guilty' on count number one and not guilty as to counts Number Two.
>
> R. J. JOHANNES,
> Foreman."

Thereupon the Court rendered its judgment as follows, to wit:

(Title of Court and Cause.)

JUDGMENT.

The United States Attorney, with the defendant and his counsel, present in court.

The defendant was duly informed by the Court of the nature of the charge against him as appears in the information herein, and of his plea of not guilty, and of his trial and the verdict of the jury of guilty as charged in Count One of said information.

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas the said defendant having been duly convicted in this court of the offense of unlawfully possessing intoxicating liquor in violation of the National Prohibition Act, committed on the 5th day of October, 1928, at Helena, in the State and District of Montana, as charged in Count One of the information herein;

IT IS THEREFORE CONSIDERED, ORDERED, AND ADJUDGED that for said offense you, the said Carl Herter pay a fine of One Hundred Dollars, and that you be confined in the Lewis and Clark County jail until said fine is paid or you are otherwise [7] discharged according to law.

Thereupon, on defendant's motion, he was granted

a stay of execution for five days within which to file a petition for appeal herein.

Judgment rendered and entered January 29, 1929.

C. R. GARLOW,
Clerk.
By H. H. Walker,
Deputy. [8]

THEREAFTER, on February 2, 1929, an order extending time to pay fine or furnish bond was filed herein, being in the words and figures following, to wit:

(Title of Court and Cause.)

ORDER EXTENDING TIME TO PAY FINE OR FURNISH BOND.

Application having been made therefor and good cause being shown, IT IS ORDERED, that the defendant have, and he is hereby given until the 12th day of February, 1929, in which to pay the fine heretofore assessed against him, or to furnish good and sufficient bond on appeal in the event an appeal is taken herein.

Done this 2 day of February, 1929.

BOURQUIN,
Judge.

Filed Feb. 2, 1929. [9]

THEREAFTER, on February 11, 1929, assignment of errors was duly filed herein, being in the words and figures following, to wit:

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Now comes the defendant above named and makes and files this his assignment of errors:

The District Court erred:

1. In denying defendant the right or opportunity to have heard in advance of his trial herein, his petition to restrain the Government from using the evidence and information gained by it by reason of an illegal search and seizure at defendant's private dwelling.

2. In denying defendant's said petition.

3. In overruling defendant's objection to the introduction of any evidence at the trial herein.

4. In denying defendant's motions to strike the testimony of the witnesses: (a) Paul Reed, (b) Orville Jones, (c) J. Q. Adams, and (d) Donald Dibble.

5. In sustaining the Government's objection to the introduction, in evidence, of the commissioner's findings of fact and conclusions of law relative to the absence of probable cause for the issuance of the search warrant herein.

6. In denying the defendant's motion to dismiss the first count of the information herein. [10]

7. During the course of defendant's argument to the jury and when counsel said: "Section 33 of

the National Prohibition Act says that it shall not be unlawful for one to possess intoxicating liquor in his own private dwelling. . . . "

To remark:

"Provided he had it before Prohibition went into effect. That is the law. Do not try to go outside of the law."

8. During the course of defendant's argument to the jury to remark: "The Court has admonished you to refrain from that line of argument. You better heed the admonition."

9. In failing and refusing to give to the jury defendant's offered instruction No. 1.

10. In failing and refusing to give to the jury defendant's offered instruction No. 2.

11. In failing and refusing to give to the jury defendant's offered instruction No. 6.

12. To charge the jury as follows: "The National Prohibition Act says when it is made to appear that liquor was found in possession that the presumption is that it was unlawful possession and the presumption must be overcome or the jury must find, namely, the possession is unlawful. There is no lawful possession of liquor even in a private residence unless it was owned by the private party before prohibition went into effect. One section is that those who had possession before prohibition went into effect did not need to report it to the Commissioner of Revenue, or whatever officer it was that was looking after *for* it, and he may still keep that liquor for himself or for his own guests, meaning the liquor that he owned before prohibition

went into effect, and, if liquor is found it must be made to appear to the satisfaction of the jury that it was not in his possession unlawfully. [11]

13. To charge the jury as follows: "The evidence is it was unlawful, moonshine and other liquors—the presumption is it was unlawful; in fact, he possessed it and the reputation of the place is it is a place where liquor is kept and sold."

14. In sustaining the Government's objection to the introduction, in evidence of the order made on December 1, 1928, by the Hon. Chas. N. Pray, a Judge of this court, remitting the search-warrant herein to the commissioner issuing the same for further proceedings and granting defendant leave to controvert the grounds on which said warrant was issued.

15. In holding that the search of defendant's private dwelling was legal.

16. There is no evidence, lawfully obtained, to sustain the verdict.

17. The verdict is against the law.

18. It was error to give and render judgment against the defendant on such verdict.

WHEREFORE, this defendant Karl (Carl) Herter, prays that said judgment and orders of said Court may be reversed.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Defendant,
Helena, Montana.

Service of foregoing admitted and copy received this 11th day of February, 1929.

WELLINGTON D. RANKIN,
United States District Attorney.
By HOWARD A. JOHNSON,
Assistant.

Filed February 11, 1929. [12]

THEREAFTER, on February 12, 1929, petition for appeal and order allowing same was duly filed herein, being in the words and figures following, to wit:

(Title of Court and Cause.)

PETITION FOR APPEAL AND ORDER ALLOWING SAME.

Now comes Karl Herter, erroneously called Carl Herter, defendant above named, and petitioning this Court for an appeal herein, respectfully says:

That on, to wit, the 5th day of October, 1928, defendant's private dwelling was searched by virtue of a search-warrant theretofore and on September 28th, 1928, issued.

That on, to wit, the 8th day of October, 1928, the said search-warrant, return, application therefore, and supporting affidavit were filed in this Court by the Commissioner issuing said warrant.

That on, to wit, the 9th day of October, 1928, defendant filed his petition in this court requesting that said search-warrant and papers be returned to

the said Commissioner issuing same and for leave to controvert the grounds on which said warrant was issued.

That on, to wit, the 1st day of November, 1928, in the above-entitled cause an information was filed against the defendant charging him severally upon two counts, with (1) unlawful possession of liquor, and (2) the maintenance of a nuisance.

That on, to wit, the first day of December, 1928, the [13] Hon. Charles N. Pray, Judge of this court, before whom the aforesaid petition was heard, made an order granting the defendant leave to controvert the grounds upon which said search-warrant was issued before the Commissioner issuing same.

That on, to wit, the 17th day of January, 1929, after hearing had before the said Commissioner issuing said warrant, said Commissioner found that there was no probable cause for the issuance of same and ordered same quashed and ordered any articles or evidence obtained under or by virtue of said warrant, suppressed.

That on the 21st day of January, 1929, defendant filed herein a verified petition setting forth in substance the above recited facts and requested that the United States District Attorney, the Prohibition Director and their assistants, agents and employees be restrained from making use in this action of any articles, evidence or information obtained by virtue of said search and seizure.

That on the 29th day of January, 1929, defend-

ant's petition last above mentioned was by the Court denied.

That on said 29th day of January, 1929, defendant was tried upon said charge and upon said two counts by a jury, that said jury found the defendant guilty upon the count charging unlawful possession of liquor and found him not guilty as to the count charging the maintenance of a nuisance.

That thereupon said Court gave and rendered its judgment against this defendant and ordered the defendant to pay a fine of one hundred dollars ($100.00).

That the defendant conceiving himself aggrieved, by said judgment, and the proceedings had prior thereto in this cause, alleges that certain errors were committed therein to his prejudice. [14]

That the defendant believes the aforesaid decisions and orders of the Court contrary to law and contrary to his rights under the Constitution of the United States; all of which more fully appears in detail in the assignment of errors filed herein.

WHEREFORE, your petition respectfully prays that his appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit for the correction of said errors so complained of; that a transcript of the record, proceedings and papers upon which said orders and rulings of said Court and the judgment was rendered may be sent to said Circuit Court of Appeals; that such appeal shall operate as a stay of proceedings under said judgment on the plaintiff's furnishing a bond in such amount as the Court may direct for such purpose

according to law, to the end that said cause may be reviewed and determined and that said judgment and every part thereof be reversed, set aside and ordered held for naught, and for such other and further relief or remedy in the premises as the Court may deem appropriate.

Dated this 11th day of February, 1929.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Petitioner.

Service of foregoing admitted this 11th day of Feb., 1929.

WELLINGTON D. RANKIN,
United States Attorney.
By HOWARD A. JOHNSON,
Assistant. [15]

ORDER ALLOWING APPEAL AND FIXING BOND.

IT IS ORDERED that the appeal of Karl (Carl) Herter be allowed and issued as above prayed for upon petitioner's executing a bond according to law in the sum of $500.00 and that upon the due execution, approval and filing of said bond for the same shall act as a supersedeas herein.

Done this 12th day of February, 1929.

BOURQUIN,
Judge.

Filed February 12, 1929. [16]

THEREAFTER on February 14, 1929, bill of exceptions as signed was ordered filed, the minute entry thereon being as follows, to wit:

[Title of Court and Cause.]

MINUTES OF COURT—FEBRUARY 14, 1929—
ORDER DENYING AMENDMENTS TO
BILL OF EXCEPTIONS.

This cause came on regularly at this time for settlement of the bill of exceptions herein, W. D. Rankin, Esq., U. S. Attorney, appearing for the United States, and Hugh R. Adair, Esq., appearing for defendant.

Thereupon the District Attorney submitted to the Court the plaintiff's proposed amendments to the bill of exceptions, whereupon Court ordered that said amendments be denied.

Thereupon the bill of exceptions as presented, was signed by the Court and ordered filed.

Entered in open court February 14, 1929.

C. R. GARLOW,
Clerk. [17]

THEREAFTER, on February 14, 1929, a bill of exceptions was duly filed herein, which is in the words and figures following, to wit:

(Title of Court and Cause.)

BILL OF EXCEPTIONS.

BE IT REMEMBERED, That on October 8,

1928, a search-warrant, together with an affidavit in support thereof, was filed herein, being in words and figures as follows, to wit: [18]

SEARCH-WARRANT.

Before WILMER JEANNETTE, United States Commissioner for the District of Montana.

United States of America,

District of Montana,—ss.

The President of the United States of America, to the Commissioner of Prohibition and to Any Administrator, Assistant Administrator, Deputy Administrator or Federal Prohibition Agent or Officer, and to Any Other Civil Officer of the United States Duly Authorized to Enforce or Assist in Enforcing Any Laws of the United States, or Any or Either of Them, GREETINGS:

WHEREAS, I, WILMER JEANNETTE, a United States Commissioner for the District of Montana, have examined on oath D. H. Corcoran, a duly appointed and qualified Federal prohibition agent, applicant herein, and have examined the affidavit of B. M. Sharp, produced by said applicant and filed by him with me in this case, and it appearing therefrom that certain intoxicating liquors fit for use as a beverage, was and is being kept for sale, sold, exchanged, used and disposed of, and that certain distilling, brewing, or wine-making utensils and apparatus, mash and other materials designed and intended for use in the manufacture of intoxicating liquor, have been and are now being kept,

possessed, used and employed in that certain place, room or building more particularly described as: A two-story building used as a residence and as a place where intoxicating liquor is kept for sale, and sold, located at 34 North Benton Avenue, in the City of Helena, Montana.

WHEREAS, the particular facts upon which this warrant is issued and probable cause is found by me to exist, are as follows, to wit:

That the application of D. H. Corcoran, Federal Prohibition Agent, and the affidavit of B. M. Sharp, produced by him and filed herein, set forth that the said B. M. Sharp, on or about the 24th day of Sept., 1928, was within said premises and purchased intoxicating liquor of Carl Herter, to wit, moonshine whiskey and home brew beer, for which he paid at the rate of 25 cents per drink.

And that a quantity of intoxicating liquor was and is being kept, possessed, stored, sold and used in and upon said premises in violation of Title II of the National Prohibition Act.

That the said Carl Herter, bears the reputation of being a person who keeps for sale and sells and manufactures, intoxicating liquor, and the premises herein above described, bear the reputation of being a place where intoxicating liquors are kept for sale and sold and manufactured in violation of the laws of the United States of America.

AND WHEREAS, I, the undersigned do find that there is probable cause to believe that the statements set forth in the said application and affidavits for the warrant are true and sufficient,

and that intoxicating liquors are manufactured, kept for sale and sold in said premises or on the person of said keeper or other persons in said premises.

NOW, THEREFORE, you are hereby Commanded in the name of the President of the United States, to enter said premises in the daytime, with necessary and proper assistance and there diligently search for said intoxicating liquors, vessels, bottles and containers of said liquors, whether in the said premises or on the person of the said keeper or other persons present, and all utensils, apparatus and materials for the manufacture of intoxicating liquors, or for the storing and possessing of the same, and all evidence of crime, of manufacturing, purchasing, possessing, selling or disposing of intoxicating liquors, as may be therein found in the form of books, recipes for manufacturing or compounding intoxicating liquors, receipts, bills of lading, notes, checks, liquor labels, letters and other such evidences, whether found in the premises or on said persons, and to report any acts concerning same, as required by law of you, and to seize, secure and bring the said property with a return of your actions thereunder to the undersigned.

You are further commanded that in the event you seize or take said liquors or other property or evidence under this warrant, to give a copy of this warrant together with a receipt for each and everything so seized, itemized in detail as nearly as may be, to the person from whom it is taken by you or

in whose possession it is found, or in case no person is present to leave a copy of this warrant with a receipt as aforesaid, in the place from which the said property is taken, and you are commanded to execute and return to the undersigned this warrant with your return thereon and inventory of all property taken, duly made and verified by you within ten days from date hereof.

Given under my hand and seal at my office this 28th day of Sept., A. D. 1928.

[Seal] WILMER JEANNETTE,
United States Commissioner for the District of Montana.

Filed Oct. 8, 1928. [19]

RETURN.

United States of America,
District of Montana,—ss.

I hereby certify that I received the within warrant, on the 28 day of Sept., A. D. 1928, and that by virtue of said warrant and authority contained herein, I did this 5 day of Oct., 1928, search*ed* the premises described therein and found and seized the following described liquors, properties and utensils, possessed and unlawfully used for the manufacture, sale and possession of intoxicating liquor, to wit: 119 quarts of home brew beer; 6 cases of 24 quart bottles to each case.

(a) I hereby certify that I then and there served said warrant by giving notice of the contents thereof and gave a copy of the within warrant together with a complete inventory of the

property seized to Carl Herter, who was present and in possession of the property seized.

(b) I hereby certify that in the absence of anyone claiming ownership or possession of the articles seized, I left at the place of seizure, a copy of the within warrant, together with an itemized receipt for the property taken.

I, Orville Jones, the officer by whom this warrant was executed do swear that the above statement and inventory, contains a detailed and true account of all property seized and acts done by me under authority of said warrant.

ORVILLE JONES.

Subscribed and sworn to before me this 6th day of October, A. D. 1928.

[Seal] WILMER JEANNETTE,
United States Commissioner.

P. S.—You will use paragraphs marked (a) or (b) in keeping with the facts and cancel the other paragraph.

Filed Oct. 8, 1928. [20]

SUPPLEMENT RETURN MADE ON SEARCH-WARRANT SERVED UPON CARL HERTER AT HELENA, MONTANA, OCTOBER 5, 1928.

2 gallons of moonshine whiskey.
5 gallons of wine.

ORVILLE JONES,
Federal Prohibition Agent.

Subscribed and sworn to before me this 6th day of October, 1928.

[Seal] WILMER JEANNETTE,
United States Commissioner.

Witnesses:

J. Q. ADAMS,
Federal Prohibition Agent.

H. DONALD DIBBLE,
Federal Prohibition Agent.

PAUL A. READ,
Federal Prohibition Agent. [21]

AFFIDAVIT FOR SEARCH-WARRANT.

United States of America,
District of Montana,—ss.

B. M. Sharp, being first duly sworn deposes and says, that he is acquainted with one, Carl Herter, whose other and true name is to this affiant unknown, but who is the person who is hereinafter referred to as Carl Herter and who was on the 24 day of Sept, 1928, in charge of that certain room, place or building, more particularly described as: A two-story building used as a residence and as a place where intoxicating liquor is kept for sale and sold and located at 34 North Benton Ave., in Helena, Montana.

That on the above mentioned date, this affiant visited the said place and * purchased a number of drinks of intoxicating liquor to wit: whiskey and beer, from Carl Herter and for which he paid the said Carl Herter at the rate of .25¢ per drink.

---

* Here make full statement of facts.

That the said Carl Herter and other persons, to this affiant unknown, were keeping stored in and about said premises, a quantity of intoxicating liquor which said intoxicating liquor was kept possessed and sold in and about said place by them in violation of the laws of the United States of America and particularly Title II of the National Prohibition Act.

That this affiant knows the reputation of the said Carl Herter and of the place above described, and knows that he bears the reputation of being a person who keeps for sale and sells intoxicating liquors unlawfully, and that said place bears the reputation of being a place where intoxicating liquors are unlawfully sold.

That this affiant knows of his own knowledge that the said property so unlawfully possessed, kept, sold and used, was then on said premises and is positive that the same is still kept, possessed, sold and used thereon.

B. M. SHARP.

Subscribed and sworn to before me this 27 day of Sept., A. D. 1928.

[Seal] CLYDE McLEMORE,
Notary Public for the State of Montana, Residing at Baker, Montana.

My commission expires Apr. 20, 1929.

Subscribed and sworn to before me this 28th Sept., 1928.

WILMER JEANNETTE,
United States Commissioner. [22]

THEREAFTER, on October 9, 1928, the petition of the defendant for the remission of said search-warrant and affidavit in support thereof to the United States Commissioner issuing said warrant was filed herein, being in the words and figures following, to wit:

In the District Court of the United States District of Montana, Great Falls Division.

In the Matter of the Petition of KARL HERTER.

PETITION FOR REMISSION OF PAPERS TO COMMISSIONER.

To the Honorable, the Judges of the United States District Court for the District of Montana:

The petition of Karl Herter respectively shows:

1. That at all times herein mentioned he did and does now reside in that private dwelling situate at No. 34 North Benton Avenue in the city of Helena, Lewis and Clark County, Montana;

2. That on Sept. 28, 1928, at Great Falls, Montana, a warrant directing a search of the above described private dwelling and premises was issued by Wilmer Jeannette, Esq., a United States Commissioner for the district of Montana, a true copy of said warrant being attached hereto, marked Exhibit "A" and hereof made a part.

3. That petitioner was this day informed and believes and therefore alleges that said Wilmer Jeannette resides and maintains his office in the city of Great Falls, county of Cascade, Montana.

4. That said city of Great Falls, Montana, where said warrant was issued and where same was returnable is more [23] than one hundred (100) miles distant from the said city of Helena wherein is situate the said private dwelling of petitioner and wherein the search hereinafter mentioned was made.

5. That D. H. Corcoran, a Federal Prohibition Agent, under oath made the application upon which said warrant was issued.

6. That an affidavit made by one B. M. Sharp was submitted to said commissioner in support of the statements made in said application;

7. That on Friday evening, the 5th day of October, 1928, at about six (6) o'clock, P. M., Federal Prohibition Agent Orville Jones and one other, whose name is to petitioner unknown, entered and searched the said private dwelling of petitioner and No. 34 North Benton Avenue in said city of Helena, Montana.

8. That at said time and at the times mentioned in the said affidavit of B. M. Sharp, the said private dwelling was and now is being occupied and used by petitioner as his private dwelling only.

9. That said agents delivered to petitioner on October 5th, 1928, a copy of said search-warrant but that said agents failed and neglected to deliver to petitioner a copy of the said affidavit of B. M. Sharp or a copy of the application of D. H. Corcoran upon which said warrant was issued.

10. That said agents seized and carried away from said private dwelling of petitioner at the time

of said search six cases of beer, five gallons of wine and two gallons of whiskey.

11. That said liquors and all thereof were and are owned [24] by petitioner and that same was and are for use only for the personal consumption of petitioner and his family residing in such private dwelling and of his *bona fide* guests when entertained by him therein.

12. That at the times mentioned in said affidavit and at the time of said search and seizure and now, no business of any kind was or is transacted or carried on in petitioner's said private dwelling by petitioner and at said times and now no intoxicating liquor was or is unlawfully sold therein and that at all of said times said private dwelling was used solely as a private dwelling by petitioner and his family.

13. That immediately after said search and on Saturday, the 6th day of October, 1928, petitioner retained one Lester H. Loble and Hugh R. Adair attorneys at law having and maintaining their offices in Helena, Montana, and duly licensed to practice in the above-entitled court, to represent him herein.

14. That on said Saturday the 6th day of October, 1928, said Federal Prohibition Agent Orville Jones returned to said United States Commissioner Wilmer Jeannette, Esq., at his office in Great Falls, Montana, said search-warrant theretofore issued by him with said agent's return duly endorsed thereon.

15. That thereupon and immediately on said Saturday, the 6th day of October, 1928, said com-

missioner annexed to said search-warrant, the said application, affidavit of B. M. Sharp, and agent's return and deposited same in the United States mails at Great Falls, Montana in an envelope addressed to C. R. Garlow, Clerk of the United States District Court at Helena, Montana, for the purpose of filing said papers in said court.

16. That on Monday, the 8th day of October, 1928, in the [25] morning of said day petitioner's counsel called said commissioner by long distance telephone and advised said commissioners that petitioner controverted the grounds on which said search-warrant was issued, that petitioner desired to and would file with said commissioner a motion to quash said warrant and affidavits in support thereof and requested a hearing for such purpose and a copy of the said affidavit of B. M. Sharp on which said warrant was issued.

17. That at said time petitioner and his said counsel had no knowledge or information that said search-warrant had been returned to said commissioner by said agents or that same had been forwarded by said commissioner to the clerk of this court at Helena, Montana for filing.

18. That thereafter said commissioner called petitioner's counsel by long distance telephone and advised him that said search-warrants, application, affidavit and return had been forwarded by him from Great Falls, Montana, to Helena, Montana, for filing.

19. That thereupon petitioner's counsel visited the office of the Clerk of this court at Helena, Mon-

tana, and there ascertained that said search-warrant and papers were this day received by said office and filed therein as of this date, to wit, on October 8th, 1928.

20. That no information or indictment has been or is filed against petitioner by reason of any matters in said affidavit of B. M. Sharp contained or on such subsequent search disclosed.

21. That petitioner's counsel to-day obtained from the office of the Clerk of this court a copy of the said affidavit of said B. M. Sharp and that petitioner knows the contents [26] thereof and that many of the material allegations and statements therein contained are untrue as more fully appears in petitioner's affidavit hereto attached and marked Exhibit "B" and hereof made a part.

22. That petitioner has fully stated the facts to his said counsel and is informed and verily believes that said search-warrant is defective and invalid and that there was no probable cause for issuing same in that the statements in the affidavit of B. M. Sharp upon which said warrant was issued are untrue in the particulars set forth in Exhibit "B" hereof.

23. That this petition is made in good faith and for the purpose of obtaining a hearing before the commissioner who issued said warrant to the end that petitioner be given an opportunity to controvert the grounds on which the said search-warrant was issued as is provided in section 625, Title 18. U. S. C. A.

24. That petitioner has at all times exercised due

diligence and acted with dispatch herein and was and is prevented from controverting the grounds on which said warrant was issued solely by reason of the foregoing facts and circumstances of which he had no notice and which he could not in the exercise of due diligence have prevented or avoided.

25. That petitioner desires to and will forthwith file his motion to quash said search-warrants and certain affidavits in support thereof with said United States Commissioner if given the opportunity so to do.

WHEREFORE petitioner prays that said search-warrant, application of D. H. Corcoran, affidavit of B. M. Sharp, and return of Orville Jones be remitted to Wilmer Jeannette, Esq., United States Commissioner at Great Fals, Montana and that [27] petitioner be given leave to file with said commissioner his motion to quash said warrant and submit proof in support thereof and that proceding be thereafter had herein pursuant to section 625, Title 18, U. S. C. A.

Dated at Helena, Montana, this 8th day of October, 1928.

KARL HERTER,
Petitioner.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Petitioner, Helena, Montana.

State of Montana,
County of Lewis and Clark,—ss.

Karl Herter, being first duly sworn on oath deposes and says: That he is the defendant named in

the above-entitled action and foregoing petition; that he has read the foregoing petition and knows the contents thereof and that the same is true of his own knowledge.

KARL HERTER.

Subscribed and sworn to before me this 8th day of October, 1928.

[Notarial Seal] HUGH R. ADAIR,

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires Aug. 19, 1930.

(That attached to said petition as Exhibit "A" is the search-warrant which is not here repeated.) [28]

EXHIBIT "B."

State of Montana,
County of Lewis and Clark,—ss.

Karl Herter, being of lawful age and first duly sworn on oath, deposes and says:

1. That he now is and at all times herein mentioned was a married man and the head of a family; that said family consists of affiant's wife and two daughters; that at all times herein mentioned and for more than four years last past affiant and his said family occupied, lived and resided in that certain two-story brick veneer dwelling house situate at No. 34 North Benton Avenue in the city of Helena, county of Lewis and Clark, state of Montana;

2. That said dwelling is and for more than four years last past has been owned by Mary E. Herter, the wife of affiant and that same is and constitutes the private dwelling, *bona fide* place of abode and sole residence of affiant and his said family and that at all times hereinafter mentioned said private dwelling was occupied and used solely as such by affiant and his said family;

3. That at none of the times hereinafter mentioned was said private dwelling house used for any business purpose such as a store, shop, saloon, restaurant, hotel or boarding house;

4. That said Benton Avenue is exclusively a residence street and particularly the block thereof in which the said private dwelling of affiant is situate;

5. That, on, to wit, the evening of October 5, 1928, at about the hour of 6 o'clock P. M. affiant's said private dwelling above described was searched by two Federal Prohibition Agents who produced a search-warrant authorizing and directing [29] such search which search-warrant was issued by one Wilmer Jeannette, a United States Commissioner for the District of Montana residing at Great Falls, Cascade County, Montana, a true and correct copy of which said search-warrant is marked Exhibit "4" hereto attached and hereof made a part.

6. That at said time said Prohibition Agents seized and carried away from said private dwelling of affiant six cases of beer, five gallons of wine and two gallons of whiskey; that affiant was and is the sole owner of said liquors and that same were pos-

sessed by him in his said private dwelling while same was and is occupied and used by him as such and that such liquors are and were for the use only for the personal consumption of affiant and his said family residing in such dwelling and of his *bona fide* guests when entertained by him therein and not for the purpose of sale or for any other unlawful purpose.

7. That on to wit October 5, 1928, at the time of said search and seizure the said Federal Prohibition Agents delivered to affiant a copy of the search-warrant issued by said Wilmer Jeannette, United States Commissioner theretofore and on to wit the 24 day of Sept., A. D. 1928, but that said Federal Prohibition Agents neglected and failed at said time or thereafter to deliver to affiant a copy of the application of D. H. Corcoran or a copy of the affidavit of B. M. Sharp mentioned in said search-warrant and on which said search-warrant was issued.

8. That on Saturday, October 6, 1928, affiant retained as his counsel herein Lester H. Loble and Hugh R. Adair, attorneys at law of Helena, Montana; that on Monday morning, October 8, 1928, affiant's said attorney Hugh R. Adair at his office in Helena, Montana, called by long distance telephone the said Wilmer Jeannette, United States Commissioner aforesaid at the latters office in Great Falls, Montana and then and there requested [30] the said United States Commissioner to forward to him a copy of the said application for search-warrant and a copy of the said affidavit of B. M. Sharp hereinbefore mentioned.

9. That thereafter the said Wilmer Jeannette, United States Commissioner advised affiant's attorney that the said search-warrant together with the application therefor, and the affidavit of said B. M. Sharp had been returned to him by said Federal Prohibition Agents conducting said search on October 6 1928, and that same was forthwith on that day by said United States Commissioner forwarded to the Clerk of the United States District Court at Helena, Montana for filing.

10. That thereupon and on said 8th day of October, 1928, affiant's said attorney Hugh R. Adair consulted the records in the office of the said C. R. Garlow, Clerk of said court in Helena, Montana, and obtained from the office of said clerk a copy of said affidavit of said B. M. Sharp and that same has been read by affiant.

11. That affiant denies that said B. M. Sharp or anyone else on the 24 day of Sept., 1928, or at any other time in said affidavit mentioned purchased any drink or drinks or intoxicating liquor from this affiant; denies that said B. M. Sharp purchased or obtained any whiskey or beer from this affiant on said date mentioned and denies that said B. M. Sharp paid to affiant the sum of 25¢ per drink or any other sum or sums being the allegations of said B. M. Sharp in said affidavit contained;

12. That affiant has fully and fairly stated all the facts in said case to his said attorney Hugh R. Adair and has been and is advised by said attorney, upon such statement, that said search-warrant was and is wrongfully issued. [31]

13. That affiant desires to and will file a motion to quash the search-warrant and affidavits in support thereof herein upon the grounds and for the reason that the facts are not as stated in the affidavit of B. M. Sharp and that upon the grounds that affiant did not on said 24 day of Sept., 1928, sell to said B. M. Sharp or to anyone else any drink or drinks of intoxicating liquor, whiskey or beer and that he did not accept from nor was he paid by said B. M. Sharp or anyone else the sum of 25¢ per drink or any other sum or sums and that at said time his said private dwelling, located at No. 34 North Benton Avenue was not used as a place where intoxicating liquor is or was kept for sale or sold;

14. That as yet no information has been filed against affiant by virtue of the matters and things in said affidavit contained or the information on such search obtained;

15. That affiant is informed and believes that the United States Commissioner is allowed ten (10) days by law in which to make and file his transcript on the return of said search-warrant and that said United States Commissioner retains jurisdiction in said cause for such period of time;

16. That affiant has been and is proceeding with diligence and dispatch and that the only reason affiant's said motion to quash the search warrant was not made before said commissioner was and is due to the fact that said commissioner forthwith and immediately forwarded said search-warrant and all papers in connection with said cause from

Great Falls, Montana to Helena on October 6, 1928, being the same day on which said return was made to him.

17. Affiant further states that the city of Great Falls in Cascade County, Montana where said United States Commissioner has his office is more than one hundred miles distant from the city of Helena, Lewis and Clark County, Montana wherein affiant's [32] private dwelling is situate and where said search and seizure was had.

Further affiant saith not.

KARL HERTER.

Subscribed and sworn to before me this 8th day of October, 1928.

[Notarial Seal] E. G. TOOMEY,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires Apr. 15, 1929. [33]

AFFIDAVIT OF HUGH R. ADAIR.

State of Montana,
County of Lewis and Clark,—ss.

Hugh R. Adair, being first duly sworn on oath, deposes and says:

1. That he is an attorney at law duly licensed to practice in the courts of the state of Montana and in the United States District Court for the District of Montana and that he has and maintains his offices in the city of Helena, county of Lewis and Clark, state of Montana.

2. That on, to wit, Saturday, October 6, 1928, he was retained by one Karl Herter to represent

him in connection with a search of the private dwelling of said Karl Herter by two Federal Prohibition Agents by virtue of a certain search-warrant theretofore issued by one Wilmer Jeannette, United States Commissioner for the District of Montana, residing and having his office in the city of Great Falls, county of Cascade, Montana.

3. That said Karl Herter delivered to affiant a copy of said search-warrant and advised affiant that no copy of the affidavit of B. M. Sharp on which said search-warrant was issued had been delivered to said Herter by said officers conducting such search and seizure.

4. That on Monday morning, October 8, 1928, affiant called said Wilmer Jeannette, United States Commissioner aforesaid, by long distance telephone and advised said United States Commissioner that affiant is representing said Karl Herter and desired to file a motion to quash the search-warrant and affidavits in support thereof with him and requested said United States Commissioner to retain said search-warrant [34] and all papers in connection therewith until affiant could prepare and file such motion and affidavit supporting same in the office of the United States Commissioner who had issued said search-warrant; that at said time affiant also requested said United States Commissioner to immediately prepare and forward to him a copy of the affidavit of B. M. Sharp theretofore filed with said commissioner and on which said search-warrant was based, which said United States Commissioner advised affiant he would do.

5. That immediately thereafter said United States Commissioner Wilmer Jeannette called affiant by long distance telephone from Great Falls, Montana, and advised affiant that the officers had made and filed their return on said search-warrant with him on Saturday, October 6, 1928, and that he had that day forwarded said search-warrant, officers' return, affidavit for search-warrant, application therefore and all papers in connection with said case to C. R. Garlow, Clerk of the District Court at Helena, Montana.

6. That thereupon and immediately affiant went to the office of said Clerk of the United States District Court at Helena, Montana, and found that said search-warrant and all papers in connection therewith was and had been on this day, to wit, October 8, 1928, filed in said office.

7. That affiant obtained from the office of said Clerk of Court a true and correct copy of the affidivit of B. M. Sharp on which said search-warrant was based and that affiant thereupon read same to Karl Herter in said affidavit mentioned.

8. That said Karl Herter, after learning the contents of said affidavit of B. M. Sharp, denies that he is acquainted with B. M. Sharp, denies that said B. M. Sharp on the 24 day of Sept., 1928, or at any other time or times purchased any drink or [35] drinks of intoxicating liquor or whiskey or beer from said Karl Herter and denies that said B. M. Sharp paid to said Karl Herter therefor at the rate of 25¢ per drink or in any other sum or sums and denies that his said residence situate at

No. 34 North Benton Avenue in Helena, Montana, was on the 24 day of Sept., 1928, or at any time or times in said affidavit mentioned used as a place where intoxicating liquor was or is kept for sale or sold.

9. That affiant has consulted the records of said court and finds no information or indictment pending against said Karl Herter by virtue of the matters in said affidavit of B. M. Sharp contained or by reason of such search and seizure conducted on, to wit, October 5, 1928.

10. That affiant as attorney for said Karl Herter has and is proceeding with dispatch and diligence and that this affidavit and the petition is made and filed in good faith and not for the purpose of delay.

11. That affiant has advised said Karl Herter to file a motion to quash said search-warrant and affidavits in support thereof with said commissioner.

12. That for the purpose of making and hearing such motions affiant has advised said Karl Herter to petition the District Court to order said search-warrant, application therefor, affidavit and all papers pertaining thereto returned to the said Wilmer Jeannette, United States Commissioner at Great Falls, Montana, for the purpose of such hearing and for the purpose of disclosing to said commissioner the real facts and circumstances and for the purpose of offering proof to rebut the allegations contained in the said affidavit of B. M. Sharp aforesaid. [36]

Further affiant saith not.

HUGH R. ADAIR.

Subscribed and sworn to before me this 8th day of October, 1928.

[Notarial Seal] E. G. TOOMEY,

Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires April 15, 1929.

Filed October 9th, 1928. [37]

THEREAFTER, on November 1, 1928, an information was filed herein charging the defendant in two counts with the violation of the National Prohibition Act.

THEREAFTER, on December 1, 1928, Judge Charles N. Pray, made and filed an order herein being in words and figures following, to wit:

In the District Court of the United States, District of Montana, Great Falls Division.

In the Matter of the Petition of KARL HERTER.

ORDER.

This matter coming on to be heard on the verified petition of Karl Herter, together with the affidavits and exhibits thereto attached and the Court being advised in the premises and good cause being shown therefor

IT IS ORDERED that the search-warrant against the premises of Karl Herter heretofore and on the 28th day of September, 1928, issued by Wilmer Jeannette, a United States Commissioner, together

with the application of D. H. Corcoran therefor, the affidavit of B. M. Sharp in support thereof and the return of Orville Jones be by the Clerk of this court remitted to said United States Commissioner Wilmer Jeannette at his office in Great Falls, Montant, for further proceedings. [38]

AND IT IS FURTHER ORDERED that the petitioner Karl Herter be and he is hereby given leave to take such other and further proceedings before such Commissioner as may be lawful to controvert the grounds on which the said warrant was issued.

Done in open court this 1st day of December, 1928.

CHARLES N. PRAY,
United States District Judge.

Filed Dec. 1st, 1928.

THEREAFTER said search-warrant together with said application therefor and affidavit in support thereof were, pursuant to said order of said District Judge, returned by the Clerk of this court to Wilmer Jeannette, United States Commissioner for the District of Montana, being the commissioner issuing said search-warrant.

THEREAFTER, on January 18, 1929, the said United States Commissioner returned to the office of the Clerk of this court said search-warrant, application therefor, affidavit in support thereof, defendant's petition for quashing said search-warrant,

transcript of testimony of various witnesses taken before said Commissioner and said Commissioner's report of proceedings had and ruling thereon, all of which were that day filed herein.

That said report and ruling of said United States Commissioner is in the words and figures following, to wit: [39]

Before WILMER JEANNETTE, United States Commissioner for the District of Montana.

In the Matter of the Petition of KARL HERTER.

REPORT OF PROCEEDINGS HAD AND RULING THEREON.

Under date of September 28, 1928, the undersigned, Wilmer Jeannette, United States Commissioner for the District of Montana, residing at Great Falls, Montana, issued a search-warrant on the application of Dan H. Corcoran, Federal Prohibition Agent, supported by the affidavit of purchase of intoxicating liquor by B. M. Sharp, for the search of a certain two-story building used as a residence, located at 34 North Benton Avenue, Helena, Montana, and occupied by Carl Herter. The return duly filed shows a search was made of the premises on the 5th day of October, 1928, and a quantity of intoxicating liquor found.

Shortly thereafter the defendant, Karl Herter, filed a petition for quashing of the search-warrant and controverting the facts set forth in the application for the issuance of the search-warrant, and requesting that a hearing be had to determine the

question of probable cause for the issuance of the search-warrant. All papers filed with the United States District Court for the District of Montana, at Helena, Montana, in connection with this search-warrant proceeding, were returned for the purpose of further hearing thereon.

Hearing was originally set for December 15, 1928, at [40] Great Falls, Montana, and later postponed to January 5, 1929. Upon stipulation of counsel for the United States and for the defendant it was agreed and hearing was had on January 5, 1929, at Helena, Montana, before the undersigned, United States Commissioner Hon. Wellington D. Rankin, United States District Attorney, appeared for the United States, and Messrs. Loble and Adair for the defendant, Karl Herter. The following witnesses were duly sworn and submitted testimony on behalf of the respective parties, as follows:

For the defendant, Karl Herter:

Paul Brazier,
Thomas Miller,
Judge A. J. Lemkie,
W. C. Scholes,
Arthur B. Nelson,
Will McKenna
Elizabeth Herter,
Mary Herter,
Anne Sailer,
Mrs. Mary E. Herter,
Karl Herter, and
J. Q. Adams.

For the United States:

Sam Roberts,
Orville Jones and
Hugh R. Adair.

All of the testimony has been reduced to writing, signed by all of the witnesses on behalf of the defendant, with the exception of J. Q. Adams, and is submitted herewith as part of the records. It appears that after the testimony was transcribed, and it was available for signature, the witnesses for the Government were out of the city and could not be reached. For that reason their testimony is submitted herewith without signature. However, all of the witnesses were duly sworn by the undersigned and their testimony transcribed by a shorthand reporter.

At the conclusion of the testimony submitted at the hearing the United States District Attorney made an offer of evidence as part of the case on behalf of the United States of the application for [41] a search-warrant and the affidavit of B. M. Sharp, which is part of the files and record in the case. Objection was made to the introduction of the said affidavit of B. M. Sharp by counsel for the defendant. A ruling thereon was reserved until such time as a decision was rendered, and it is deemed advisable to pass upon this question at this time before going into a review of the testimony.

The informing witness, B. M. Sharp, appeared before me as United States Commissioner, in my office at Great Falls, Montana, on September 28, 1928, at which time he was duly sworn and his sig-

nature affixed to his affidavit, which would constitute his testimony for the purpose of the issuance of the search-warrant. Cornelius on Search and Seizure, page 276, states

> "The United States commissioner may use the complaint and affidavit upon which the warrant for arrest was sought, as well as the affidavit for search-warrant, in determining what would constitute probable cause for the issuance of the warrant,"

and cites the case of In re Rosenwasser Brothers, Inc., 254 Fed. 171, as authority therefor. Inasmuch as this witness appeared before me in person, his testimony was reduced to writing and subscribed and sworn to by him before me, I believe it is entitled to such consideration for the determination of the question of probable cause for the issuance of the search-warrant as it may merit, and I will therefore overrule the objection of the attorney for the defendant and will admit the offer of such affidavit as evidence in this proceeding.

Reviewing the testimony submitted at the hearing the following facts are unquestioned and undisputed. That at all times mentioned in this proceeding, the premises at No. 34 North Benton Avenue, in the city of Helena, Montana, was and is a seven-room two-story stucco building and occupied as a private dwelling by the defendant, Karl Herter and his family. That a search of said premises was made by the Federal Prohibition Agents under and by virtue of the search-warrant herein involved, and that a quantity of intoxicating liquor

[42] was found on the premises. And that the said intoxicating liquor is claimed and owned by the defendant, Karl Herter.

The questions at issue are, did the defendant Karl Herter sell intoxicating liquor to B. M. Sharp on September 24, 1928, as set forth in the latter's affidavit, and was there probable cause for the issuance of the search-warrant.

The defendant introduced the testimony of eleven witnesses, besides his own. The testimony shows that the defendant was employed as a night watchman at the Fair Grounds in Helena, Montana, for a period of seven days, beginning the night of September 22, 1928. That he went to work at eight o'clock on Sunday evening, September 23, 1928, and remained on duty until eight o'clock on Monday morning, September 24, 1928. That he had trouble in starting his car and did not arrive home until about nine o'clock that morning, September 24th. That he ate breakfast and immediately went upstairs to bed. That he slept until 12:00, when he heard the whistles blowing and his wife calling him for dinner. That he ate his dinner, dressed hurriedly and left the house shortly before 1:00 o'clock P. M., with members of his family, to attend the opening, or Al Smith day, at the Montana State Fair. During the afternoon he saw and conversed with numerous of the witnesses and was at the Fair Grounds until about 6:00 o'clock P. M., returning home about 6:30 P. M., at which time he ate, changed his clothes hurriedly, and returned to the Fair Grounds, where he reported for duty as

night watchman at about 7:30 P. M. That he remained on duty that night and until eight o'clock the morning of September 25, 1928. All of this testimony is corroborated by numerous witnesses and is uncontroverted.

September 24, 1928, is the date alleged in the affidavit of B. M. Sharp, as the date on which he (B. M. Sharp) purchased intoxicating liquor from the defendant Karl Herter. It also happens that this particular date was the first day of the Montana State Fair held [43] at Helena, Montana, and the day on which Governor Al Smith, of New York, appeared at the fair grounds, which facts tend to fix that particular day in the minds of the various witnesses. No definite time is fixed in the affidavit of B. M. Sharp as to the particular time of day on the 24th of September, 1928, when the alleged sale was made. As hereinbefore set forth, the defendant, has shown by the testimony submitted that the only time during that particular day that he was at the premises or in the house at 34 North Benton Avenue was during the period from 9:00 o'clock A. M., until shortly before 1:00 o'clock P. M., and again from 6:30 o'clock P. M., until some time before 7:30 o'clock P. M. The testimony of Elizabeth Herter, Mary Herter, Anne Sailer, and Mrs. Mary E. Herter, was introduced to the effect that all of these witnesses were present on the premises during all or some portion of the particular day in question, either one, two or more of the said witnesses being on the premises at all times during the day, and that during the periods that the de-

fendant was at home that neither B. M. Sharp, who is unknown to them, or any other man visited the said premises, and that there was no sale of any kind to the said B. M. Sharp or to any other persons. These witnesses testified further that the said B. M. Sharp, did not visit the said premises during the said day, and that there was no other strange person who visited the premises during the said day, nor was there any sale of intoxicating liquor upon the said premises during the said day. The testimony of these witnesses corroborates the testimony of the defendant himself with regard to the sale of intoxicating liquor, or the visit of B. M. Sharp or any other person at the premises during such time as the defendant himself was at home during that particular day.

The following testimony was submitted on behalf of the United States: Sam Roberts, Assistant Prohibition Administrator, and Orville Jones, Federal Prohibition Agent, testified that the place here in question has the reputation at the times here in [44] question of being a place where intoxicating liquor is sold. Hugh R. Adair, attorney for the the defendant, called by the United States District Attorney as a witness, testified that the place has not had such a reputation since June, 1928, and that the reputation of the place is good. The affidavit of B. M. Sharp alleging the sale and purchase of intoxicating liquor was introduced as part of the Government's case. No evidence was offered by the Government in contradiction of the testimony submitted on behalf of the defendant other that

this said affidavit of B. M. Sharp. B. M. Sharp was not present at the hearing. The record shows that the defendant caused a subpoena to be issued for B. M. Sharp, which subpoena was returned by the Marshal with the return that B. M. Sharp could not be found. In rebuttal of the Government's testimony, the defendant called J. Q. Adams, Federal Prohibition Agent, as a witness, and who testified that he was at the Karl Herter residence on two different occasions and was unable to purchase intoxicating liquor from defendant. These occasions were prior to September 24, 1928, but the evidence goes to the reputation of the place.

The National Prohibition Act specifically provides that "No Search Warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor. . . ." The only evidence to that effect for consideration here consists of the *ex parte* affidavit of B. M. Sharp. This affidavit is in direct contradiction to the testimony of twelve witnesses for and on behalf of the defendant. All of these witnesses were present in person at the hearing. The United States District Attorney had an opportunity of cross-examining them and also offering any other testimony in rebuttal which he might have on the subject. The witness B. M. Sharp was not present and the defendants had no opportunity of cross-examining him. His affidavit is entitled to consideration in this hearing, but only such as it may merit. It [45] would appear that the preponderance of the evidence is to the effect that

there was no sale of intoxicating liquor by Karl Herter, the defendant, to the said B. M. Sharp, on the 24th day of September, 1928, at or on the premises described in the search-warrant, and I so find.

CONCLUSIONS OF LAW.

I therefore find that there was no probable cause for the issuance of the said search-warrant and that the said search-warrant should be and the same is hereby quashed and that any articles or evidence obtained under or by virtue of the search and seizure made under this search-warrant be, and it is hereby, ordered suppressed.

The disposition of the said liquor and articles seized under and by virtue of the said search-warrant is left subject to such order as the United States District Court for the District of Montana may deem proper.

Dated this 17th day of January, 1929.

[Seal] (Signed) WILMER JEANNETTE,
United States Commissioner.

Filed Jan. 18, 1929. [46]

THEREAFTER, on, to wit, January 21, 1929, the defendant filed his certain petition herein, being in words and figures following, to wit:

In the District Court of the United States, District of Montana, Helena Division.

In Case No. 4862.

UNITED STATES OF AMERICA

vs.

KARL HERTER,

Defendant.

PETITION.

To the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana.

The petition of Karl Herter respectfully shows:

1. That at all times herein mentioned petitioner did and now does reside in that certain seven-room, private dwelling, situate at 34 North Benton Avenue in the city of Helena, Lewis and Clark County, Montana, with his family and that said family consisted and now consists of petitioner's wife, the mother of petitioner's wife and petitioner's two daughters.

2. That on, to wit, the 28th day of September, 1928, at Great Falls, Montana, a warrant for the search of the above-described petitioner's private dwelling was issued by the Honorable Wilmer Jeannette, Esq., U. S. Commissioner for the District of Montana, residing at Great Falls, Montana.

3. That the only evidence of probable cause submitted to said Commissioner was an affidavit made

by one B. M. Sharp before said Commissioner and filed with said Commissioner.

4. That on October 5th, 1928, petitioner's private dwelling at 34 North Benton Avenue, in said city of Helena, Montana, was searched by two Federal Prohibition Officers under and by virtue of said warrant so issued by said Commissioner as aforesaid. [47]

5. That said agents seized and carried away from said private dwelling of petitioner, at the time of said entrance and search, to wit, October 5th, 1928, certain intoxicating liquor, then and there the property of this petitioner and none other, and that same was and is for the use only for the personal consumption of petitioner and his family, residing in said private dwelling, and of his *bona fide* guests when entertained by him therein.

6. That thereafter and on October 9th, 1928, petitioner petitioned the United States District Court for the District of Montana, Great Falls Division, for an order to remit to said Commissioner said search-warrant and all papers connected therewith and for leave to controvert the grounds on which said search-warrant was issued.

7. That thereafter said matter was duly submitted to the Honorable Chas. N. Pray, one of the Judges of the District Court of the United States, for the District of Montana, who thereupon and on December 1st, 1928, ordered said search-warrant to be returned to said Commissioner and granted leave of this petitioner to controvert, before said

Commissioner, the grounds upon which said warrant was issued.

8. That thereupon petitioner, pursuant to Section 625, U. S. C. A., Title 18, filed his duly verified petition with said U. S. Commissioner, controverting the grounds upon which said search-warrant was issued and particularly the statements in the affidavit, which said B. M. Sharp filed.

9. That thereafter and on January 5th, 1929, said petition came regularly on for hearing before Wilmer Jeannette, Esq., U. S. Commissioner, as aforesaid, who proceeded to take testimony in relation thereto of numerous [48] divers witnesses, who appeared then and there before said Commissioner and gave testimony therein.

10. That thereafter and on to wit, the seventeenth day of January, 1929, said Commissioner made certain findings of fact and conclusions of law therein and ordered the said search-warrant so issued by him quashed and the information and evidence obtained by means of said warrant suppressed.

11. That thereafter and on, to wit, the 18th day of January, 1929, said findings of fact and conclusions of law, and order of said Commissioner, together with said search-warrant, the transcribed testimony taken at said hearing, and other papers in connection with this matter and cause, were filed in the office of this clerk, at Helena, Montana.

12. That on, to wit, November 1st, 1928, and while said petition above referred to was pending in the Great Falls Division of this court, an infor-

mation was filed against petitioner charging him in four counts with a violation of the National Prohibition Act, being cause No. 4862 herein.

13. That the evidence upon which the Government relies for the prosecution of said action and all thereof, was obtained by virtue of said search-warrant so issued by said Commissioner, which has been and now is ordered quashed.

14. That the above-entitled cause No. 4862, has been set for trial in this court for January 29th, 1929.

15. That the information filed herein is based upon the articles seized and found and the information obtained as a result of said illegal search of petitioner's private dwelling.

WHEREFORE petitioner prays:

1. That on the hearing of the above-entitled case and on the trial thereof, the U. S. District Attorney for the District [49] of Montana, the Director of Prohibition for the District of Montana, the United States Marshal for the District of Montana and any and all assistants, employees or agents of them, or either of them, be prohibited the use of the articles and things found in the above-described private dwelling of petitioner and from making the use of any information gained by the service of said proceedings on search of said dwelling on, to wit, the 5th day of October, 1928.

2. That the above named and all or any of them be prohibited from testifying to any and all of the acts done at or upon said premises above described.

3. That this Court order returned to petitioner any and all property taken under and by virtue of said search-warrant.

4. That petitioner have such other aand further relief that this Court deems just.

This petition will be supported by the files and records of this case and the proceedings had before the Honorable Charles N. Pray, District Judge, aforesaid, and before said Wilmer Jeannette, U. S. Commissioner, as aforesaid and upon the findings of fact and conclusions of law and orders made by said U. S. Commissioner herein pursuant to Section 625 and 626, Title 18, U. S. C. A.

KARL HERTER,
Petitioner,
Helena, Montana.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Petitioner,
Helena, Montana. [50]

United States of America,
District of Montana,
County of Lewis and Clark,—ss.

Karl Herter, being first duly sworn according to law, deposes and says: That he is the petitioner named in the above-entitled cause; that he has read the foregoing petition and knows the contents thereof and that the matters and things therein stated are true.

KARL HERTER.

Subscribed and sworn to before me this 19th day of January, 1929.

[Notarial Seal] HUGH R. ADAIR,
Notary Public for the State of Montana, Residing at Helena, Montana.

My commission expires Aug. 19, 1920.

Service of the foregoing petition and copy thereof received this 19th day of January, 1929.

WELLINGTON D. RANKIN,
U. S. Dist. Atty.
By R. SILLERS.

Filed Jan. 21, 1929. [51]

THEREAFTER, on January 21, 1929, a notice calling said petition for hearing was filed herein, being in the words and figures following, to wit:

(Title of Court and Cause.)

NOTICE.

To the United States of America, WELLINGTON D. RANKIN, United States District Attorney, and CARL JACKSON, Prohibition Director.

You and each of you please take notice: That on, to wit, the 24th day of January, 1929, at 9:30 o'clock in the forenoon of said day or as soon thereafter as counsel can be heard, the defendant, Karl Herter will bring on for hearing before the above-entitled court in the courtroom thereof, in the Post Office Building thereof, in the city of Helena, Montana, that certain petition to suppress the evidence herein. A true and correct copy of said petition is herewith served upon you.

Dated this 19th day of January, 1929.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Petitioner,
Helena, Montana.

Service of the foregoing notice admitted this 19th day of January, 1929.

WELLINGTON D. RANKIN,
U. S. Dist. Atty.
By R. SILLERS.

Filed Jan. 21, 1929. [52]

THEREAFTER, on January 29th, 1929, said cause came on for arraignment, plea, hearing, and trial in the above-entitled court before the Hon. George Bourquin, Judge thereof; Wellington D. Rankin, United States District Attorney for the District of Montana appearing as counsel for the Government, and Hugh R. Adair appearing as counsel for the defendant and the said defendant present in person.

Whereupon the following proceedings were had and done:

MORNING SESSION.

The CLERK.—The case of the United States against Karl Herter, No. 4862.

Mr. ADAIR.—Let the record show the names of Lester H. Loble and myself appear as attorneys for the defendant, and we have filed herein a petition in the nature of a plea in abatement.

The COURT.—Motion to suppress evidence?

Mr. RANKIN.—Yes, your Honor.

Mr. ADAIR.—It is not a motion to suppress evidence. The search-warrant under which the search was made has been quashed.

The COURT.—If the information is good on its face it is sufficient. Overruled. Enter your plea.

Mr. ADAIR.—Exception. Not guilty.

The COURT.—Call the next one.

(And thereupon the Court proceeded to the trial of other cases.)

Mr. RANKIN.—If your Honor please, it is agreeable the case go over until after lunch, if it is agreeable to your Honor. [53]

The COURT.—Very well.

AFTERNOON SESSION.

The case of the United States vs. Karl Herter was called:

The COURT.—Draw a jury.

Mr. ADAIR.—May it please the Court: Before a jury is empanelled we would like to have the motion or petition heard in this action.

The COURT.—What have you?

Mr. ADAIR.—The petition, it is in the nature of a plea in abatement, I think.

The COURT.—Let's see it. How long has this been filed?

Mr. ADAIR.—This was filed immediately after the Commissioner's ruling on the defendant's petition. It has been noticed; on motion of the District Attorney was continued until to-day.

The COURT.—What do you call this, Counsel?

(Testimony of J. Q. Adams.)

Mr. ADAIR.—We call it a petition to restrain the District Attorney and the Prohibition Director from using in evidence the articles found and information obtained in the search of the defendant's dwelling.

The COURT.—Is this what you called the plea in abatement this morning?

Mr. ADAIR.—I think it is in the nature of a plea in abatement; it states the facts as required in a plea in abatement.

The COURT.—Well, taking it as a plea in abatement it will be denied. If you have anything to support it it will be heard during the trial and if it is meritorious you will get the benefit. [54]

Mr. ADAIR.—Then considered as a motion to suppress.

The COURT.—Denied.

Mr. ADAIR.—Note an exception to the rulings.

The COURT.—Proceed.

(And thereupon a jury was called, examined, and sworn to try the cause.)

TESTIMONY OF J. Q. ADAMS, FOR THE GOVERNMENT.

J. Q. ADAMS, being called as a witness on behalf of the prosecution, was duly sworn and testified as follows:

Direct Examination by Mr. RANKIN.

The WITNESS.—My name is J. Q. Adams; I am a Federal Prohibition Agent, Civil Service.

Mr. ADAIR.—Just a moment. At this time we object to the introduction of any evidence upon the

(Testimony of J. Q. Adams.)

ground that the search-warrant on which the search was made has been ordered quashed, and the search was not legal, and there was no probable cause for the issuance of the warrant.

The COURT.—Overruled.

Mr. ADAIR.—Exception.

The COURT.—If there is any merit in your contention you will receive the benefit of it during the trial.

Mr. RANKIN.—I will excuse this witness at this time and call Agent Reed.

Witness excused.

TESTIMONY OF PAUL REED, FOR THE GOVERNMENT.

PAUL REED, being called as a witness on behalf of the Government, was duly sworn and testified as follows:

Direct Examination by Mr. RANKIN.

The WITNESS.—My name is Paul Reed; I am a Federal Prohibition Agent, Civil Service. You ask me to tell of my connection [55] with this stuff on the 5th day of October, 1928: On that date Agent Orville Jones and myself went to the house 34 North Benton just a little before sundown; he had a search-warrant based on sale. Mr. Jones served the search-warrant on the defendant Herter, and informed him he was a federal officer. We sear*ce*d the place and we found three quarts of home brew beer in an ice-box shed in the rear of the house, 261 quarts

(Testimony of Paul Reed.)

of beer in the basement; it was home brew beer, five gallons of wine, and two gallons of whiskey. In one of these barrels there is whisky and the other is wine. This beer and whisky was intoxicating liquor.

Q. Do you know the reputation of this place?

A. Yes, sir.

Q. What is it? A. Bad.

Mr. ADAIR.—Just a moment. We object to that as immaterial.

The COURT.—Generally it is unless you show it is something material to the action.

Mr. RANKIN.—The nuisance charge.

The COURT.—What kind of a reputation are you inquiring about?

Q. Well, now, it has the reputation of a place where intoxicating liquor is kept and sold?

A. Yes, sir.

Q. What is the reputation? A. Bad.

Mr. ADAIR.—Object to that and ask it be stricken as immaterial.

The COURT.—It is very material. [56]

Mr. RANKIN.—Cross-examine.

Mr. ADAIR.—If your Honor please: We ask that the evidence be stricken upon the ground it was procured on a search-warrant which has been quashed.

The COURT.—Motion denied.

Mr. ADAIR.—Exception.

(Testimony of Paul Reed.)

Cross-examination by Mr. ADAIR.

The WITNESS.—This place which we searched, 34 North Benton, is a residence. As to how many rooms there is in it, I didn't count the rooms; there must have been seven or eight; it is just a private residence. I did see the defendant there, and I saw the defendant's wife there, and his two daughters. I don't believe that I saw an old lady there, the mother of Mrs. Herter. I did go upstairs, and there was someone in a dark room there; I couldn't say who it was.

Q. In bed?

The COURT.—Well, counsel knows what he did state.

Mr. ADAIR.—That's all.

Witness excused.

TESTIMONY OF ORVILLE JONES, FOR THE GOVERNMENT.

ORVILLE JONES, being called as a witness on behalf of the Government, was duly sworn and testified as follows:

Direct Examination by Mr. RANKIN.

The WITNESS.—My name is Orville Jones; I am a Civil Service Prohibition Agent. I was formerly Undersheriff of Gallatin County for about four years. My connection with this defendant was that on October 5th, with Paul Reed, I searched the

(Testimony of Orville Jones.)

premises 34 North Benton, search-warrant served; as he passed me I talked to Herter.

Q. Was the search-warrant based on having a sale? [57] A. Yes, sir.

Mr. ADAIR.—To which we object as calling for a conclusion, and not the best evidence.

The COURT.—Objection sustained.

The WITNESS.—We found 261 quarts of home beer, about two gallons of moonshine whisky, and five gallons of wine. The defendant was present; he answered the knock at the door.

Q. What did he do with reference to this liquor? What did he say to you? A. Oh! What he said?

Q. Yes.

Mr. ADAIR.—To which we object as being immaterial to any issue of the case.

The COURT.—Overruled.

Mr. ADAIR.—Exception.

A. He cussed us out, struck at me; Reed caught his hand.

Q. What did he call you?

The COURT.—I don't think that is material. The Court had in mind you were seeking some admissions.

The WITNESS.—He did not admit ownership of the whisky or wine.

Mr. RANKIN.—That's all.

Mr. ADAIR.—We move that all the testimony of the witness be stricken upon the ground that the search-warrant has been ordered quashed; there

(Testimony of Orville Jones.)

was no probable cause for the issuance of the same, and the search was illegal.

The COURT.—Denied.

Mr. ADAIR.—Exception.

Cross-examination by Mr. ADAIR.

The WITNESS.—I said he cussed us out; he cussed me out [58] upstairs and downstairs in the basement, both. He went downstairs of his own accord; I did not call him down. I did not take my finger and hit him atop of the nose, and that is not when he cussed me the first time. I did not almost tear the shirt off him; Reed and I did not almost tear the shirt off him; I did not strike him; the only thing I did was to serve the warrant on him.

The COURT.—Any further questions?

Mr. ADAIR.—No.

Witness excused.

TESTIMONY OF J. Q. ADAMS, FOR THE GOVERNMENT (RECALLED).

J. Q. ADAMS, being recalled as a witness on behalf of the Government, testified as follows:

Direct Examination by Mr. RANKIN.

The WITNESS.—You ask if I was present at the search: I was called there to assist in hauling the stuff from the house. There was found there 261 quarts of home brew beer, about two gallons of whisky, and five gallons of wine, which was all of an intoxicating character. I was not present at the

(Testimony of J. Q. Adams.)

search, not until after it was found. I did not hear the comments of the defendant.

Mr. ADAIR.—We move that all the testimony given by the witness be stricken upon the ground that the search-warrant has been ordered quashed; there was no probable cause for the issuance of the same, and the search was illegal.

The COURT.—Motion denied.

Mr. ADAIR.—Exception. No further cross-examination.

Witness excused.

TESTIMONY OF DONALD DIBBLE, FOR THE GOVERNMENT.

DONALD DIBBLE, being called as a witness on behalf of the [59] Government, was duly sworn and testified as follows:

Direct Examination by Mr. RANKIN.

The WITNESS.—My name is Donald Dibble; I am a Federal Prohibition Agent, Civil Service. My connection with this case was I was called to assist in the seizure and removal of whisky, wine and beer on October 5th; we found 261 quarts of beer, about five gallons of wine, two gallons of whisky. The reputation of this place is it is a place where intoxicating liquor is sold; that is the reputation.

Q. Has been for a long time?

Mr. ADAIR.—Just a moment. We object to that as assuming a case—

Mr. RANKIN.—That's all.

Mr. ADAIR.—At this time we move to strike out all the testimony of the witness upon the ground the search-warrant on which they proceeded has been quashed; there was no probable cause of the issuance of the same, and that the search was illegal.

The COURT.—It doesn't appear to the Court that it was. I suppose you will have some defense. As far as quashing the search-warrant in the action, nobody outside of the Court can quash it.

Mr. ADAIR.—Exception.

Witness excused.

Mr. RANKIN.—The Government rests.

The COURT.—Proceed with the defense.

Mr. ADAIR.—Call Mr. Walker, the Clerk of the court.

The COURT.—What is it you want to show? Something in [60] the record?

Mr. ADAIR.—We have an offer.

The COURT.—I don't want the offer. The record is all that is necessary.

Mr. ADAIR.—We would like to introduce at this time the original search-warrant which has been filed in this court.

The COURT.—The Clerk will produce it.

Mr. ADAIR.—Also the order dated December 1st, 1928, given by Honorable Judge Pray, a Judge of this court, ordering the search-warrant to be returned to the Commissioner and granting leave to the defendant to controvert the statements.

Also the finding of fact and conclusions of the Commissioner dated January 17th showing the

search-warrant that was issued by him was quashed and the evidence obtained by it suppressed.

Mr. RANKIN.—To which we object as immaterial and incompetent.

The COURT.—For the present the Court will sustain the objection.

Mr. ADAIR.—Note an exception to the ruling. We rest.

The COURT.—Let me see this ruling, or order. Any further argument?

Mr. ADAIR.—If your Honor please, we have a motion.

The COURT.—Very well. State it.

Mr. ADAIR.—We move that this case, or, that the count relating to the possession of articles be dismissed upon the ground that there is absolutely no evidence in this [61] case of the possession of any articles designed for the manufacture of intoxicating liquor.

We ask for the dismissal of the nuisance count upon the ground that there is absolutely no evidence that this liquor or any of it was used for unlawful purposes, and that there is no evidence to support the allegation that the private dwelling of the defendant was used as a common nuisance on the date charged.

We move to dismiss the count as to the manufacture of intoxicating liquor upon the ground there is absolutely no evidence in this case tending to prove that the defendant, or anyone under his direction—

The COURT.—There is no charge of manufacturing.

Mr. RANKIN.—There is no such charge. The charge is possession and nuisance; nuisance by reason of the unlawful possession kept in violation of the National Prohibition Act.

Mr. ADAIR.—Only two counts?

The COURT.—That's all.

Mr. ADAIR.—We ask the case be dismissed upon the ground that there is no evidence in this case of any sale, or that the liquor possessed was unlawfully possessed, or was possessed for any purpose violating the National Prohibition Act.

The COURT.—When did the defendant plead in this case?

Mr. ADAIR.—This morning.

The COURT.—I don't remember of any arraignment. The motion on each one is denied.

Mr. ADAIR.—Note an exception.

The COURT.—You may argue, if you want to. [62]

Mr. RANKIN.—May it please the Court, and Gentlemen of the Jury: There is nothing to argue. The Court has ruled the evidence is compentent, and the moonshine whiskey was found there, and moonshine whiskey can never be possessed legally and, of course, with that I think you will be able to find the defendant guilty.

Mr. ADAIR.—May it please the Court; Gentlemen of the Jury:

The counsel for the Government has stated to you his views of the case. Section 33 of the Na-

tional Prohibition Act says that it shall not be unlawful for one to possess intoxicating liquors in his own private dwelling—

The COURT.—Provided he had it before prohibition went into effect; that is the law. Don't try to go outside of the law.

Mr. ADAIR.—We except to the remarks of the Court.

The COURT.—The Court will declare the law.

Mr. ADAIR.—In this case there was no evidence that Karl Herter was possessing liquor for any unlawful purpose. According to our view, and the evidence and the law, there is absolutely no evidence in this case of any sale, or sales of intoxicating liquor. It is true that most of us possessed it at some time. It is true that he possessed intoxicating liquor; that he possessed wine and whisky and beer; it is true that most of us possessed it at some time, and it is true that it is not considered generally, nor by the law, to be unlawful to possess intoxicating liquor in your own home—

The COURT.—The Court has admonished you to refrain from that line of argument. You better heed the admonition. [63]

Mr. ADAIR.—To which remarks of the Court we except at this time.

We believe that upon the evidence submitted to this jury we are entitled to a verdict of acquittal. We believe if this man has sold intoxicating liquor the Government should have charged him with a sale and proved the sale. He is not charged with

it, but with unlawful possession as the Court has told you, and he is charged with maintaining a common nuisance. In my view of the law the Government has failed to prove each and every count.

May it please the Court: I have some instructions I would like to have given at this time. (Same handed to the Court.)

And thereupon the Court proceeded to charge the jury.

CHARGE OF COURT TO THE JURY.

The COURT.—Gentlemen of the Jury: You have heard the arguments and the evidence, and now it is for the Court to instruct you. The defense stands on what he expressed as his views of the law, which he has a right to do, but you will remember the Court gives you the law, and you follow the law as given by the Court; you determine the facts.

That intoxicating liquors were found on the premises is undisputed; no question but what it was found there. The law is this: we pass the search-warrant; you have nothing to do with it; the Court has passed on it. The search was legal. If there is anything wrong with that the defendant has a right to go to the Circuit Court of Appeals, or to raise it on a motion for new trial—unless on all the evidence you find him guilty beyond a reasonable doubt, the credibility of the witnesses is for you. The defendant has not taken the witness-stand in his own behalf. [64] You are not to infer any-

thing against him by reason of his silence. The law is that he may testify in his own behalf but if he does not no adverse inference shall be drawn from that fact.

The charge is, first: He unlawfully possessed intoxicating liquor and the facts show that upon the search-warrant there was found whisky, wine and beer. These facts have been shown to you. The National Prohibition Act says when it is made to appear that liquor was found in possession that the presumption is that it was unlawful possession, and the presumption must be overcome or the jury must find, namely, the possession is unlawful. There is no lawful possession of liquor even in a private residence unless it was owned by the private party before prohibition went into effect. One section is that those who had possession before prohibition went into effect did not need to report it to the Commissioner of Revenue, or whatever officer it was that was looking after for it, and he may still keep that liquor for himself or for his own guests, meaning the liquor that he owned before prohibition went into effect, and, if liquor is found it must be made to appear to the satisfaction of the jury that it was not in his possession unlawfully. So much for the first count.

The second count is the defendant had the possession unlawfully of this liquor, constituting his place a common nuisance; that is, the law provides that anyone who keeps liquor in any kind of place for the purpose of barter and sale is guilty of a common nuisance. The question for you is: Was

this liquor under the second count—two counts—kept for the purpose of barter and sale? If it was not the place would not be a nuisance, and the place would not [65] be a nuisance unless he kept it for sale. The evidence is it was unlawful, moonshine and other liquors—the presumption is it was unlawful; in fact he possessed it and the reputation of the place is it is a place where liquor is kept and sold. The question for you is: Was this liquor being kept by the defendant for the purpose of sale? If it was he is guilty of the second count, guilty of common nuisance. If it was not kept for sale then the place is not a common nuisance; he is not guilty of the second count.

Mr. ADAIR.—At this time, may it please the Court, we desire to take exception to that portion of the Court's charge to the jury wherein he states that there is a presumption that liquors possessed in one's private dwelling is unlawfully possessed and the burden is upon the defendant to show that the possession is not unlawful.

The COURT.—Let the record so show.

Mr. ADAIR.—Also to that portion of the Court's charge wherein he says there is no lawful possession of liquor unless acquired before the Prohibition Law went into effect.

The COURT.—Let the record show his exceptions. (Addressing the Jury.) When you retire to the jury-room select one of your number as foreman. It takes twelve to agree.

(And thereupon the jury retired to consider of its verdict, and afterwards returned into court

with its verdict finding the defendant guilty on Count One, and not guilty on Count Two. Thereupon the jury was excused until to-morrow morning at 9:30 o'clock.)

The COURT.—Defendant, the jury has found you guilty of Count One, unlawful possession of whisky, wine, and beer; [66] and not guilty of Count Two. In the circumstances the Court fines you One Hundred Dollars.

Mr. ADAIR.—May we have five days in which to perfect an appeal?

The COURT.—You may.

Mr. ADAIR.—On the same bond?

The COURT.—Oh! I think so. You will file a new bond then.

That prior to the Court's charge to the jury herein the defendant requested that six proposed instructions be given to the jury on his behalf.

That said proposed instructions were and are in writing and were filed herein on Jan. 29th, 1929.

That defendant's proposed instructions numbered 1, 2, and 6 were and are in words and figures as follows, to wit:

INSTRUCTION No. 1.

The Court instructs the jury that liquor may be legally or illegally possessed. Possession is not made an offense under the Eighteenth Amendment, nor is possession of itself made an offense under the Volstead Act. Possession of intoxicating liquor in one's private dwelling only becomes illegal

when the possession is for the purpose of violating the law.

INSTRUCTION No. 2.

That the Court instructs the jury that before they are warranted in finding the defendant guilty of unlawful possession of intoxicating liquor in his private dwelling, they must first find from the evidence beyond a reasonable doubt that the defendant had in his possession intoxicating liquor with the intent to sell, barter, or otherwise dispose of same in violation of the law. [67]

INSTRUCTION No. 6.

The Court instructs the jury that it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied and used by him as his dwelling only provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his *bona fide* guests when entertained by him therein.

That judgment of conviction in accordance with the jury's verdict herein was on, to wit, Jan. 29th, 1929, duly made, given, rendered and entered against this defendant.

And now, within the time allowed by law and by order of the Court, the above-named defendant, Karl (Carl) Herter, presents the foregoing as and for his proposed bill of exceptions in said cause and asks that same be signed, settled and allowed.

Dated this 2d day of February, 1929.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Defendant,
Helena, Montana.

Service of the foregoing proposed bill of exceptions and receipt of copy of same acknowledged this 2d day of February, 1929.

WELLINGTON D. RANKIN,
U. S. District Attorney.
By HOWARD A. JOHNSEN. [68]

STIPULATION RE BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED that the foregoing may be forthwith signed, settled and allowed by the Honorable George M. Bourquin, Judge who presided at the trial of said cause, as a true and correct bill of exceptions herein and that the same may thereafter be filed in the above-entitled court and cause as and for a true and correct bill of exceptions to the rulings made and the proceedings had herein at the trial of said cause.

Dated this —— day of February, 1929.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Defendant.

_____,
U. S. District Attorney.
By _____.

NOTICE.

To the United States of America and to WELLINGTON D. RANKIN, United States District Attorney for the District of Montana:

YOU WILL PLEASE TAKE NOTICE that on the 13th day of February, 1929, at Helena Montana, at the hour of 9:30 o'clock A. M. or as soon thereafter as counsel can be heard the defendant will call up for settlement and allowance the foregoing proposed bill of exceptions this day lodged with the Clerk and ask that the Court sign, settle and allow same.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Defendant.

Service of the foregoing notice admitted and receipt of copy of same acknowledged this 2d day of February, 1929.

WELLINGTON D. RANKIN,
U. S. District Attorney.
HOWARD A. JOHNSEN,
Assistant U. S. Atty. [69]

CERTIFICATE OF JUDGE TO BILL OF EXCEPTIONS.

I, George M. Bourquin, Judge of the above-entitled court, who presided at the trial thereof, after due notice given to the plaintiff herein, have settled and signed the foregoing bill of exceptions

and have ordered that the same be made a part of the record of said cause.

Feb. 15, '29.

BOURQUIN,
Judge.

Bill of exceptions lodged in Clerk's office February 2, 1929.

Filed February 14, 1929. [70]

THEREAFTER, on February 25, 1929, stipulation re record was duly filed herein, being in the words and figures following, to wit:

(Title of Court and Cause.)

STIPULATION RE RECORD.

Pursuant to Subdivision 8 of Rule 23 (C. C. A. 9),—

IT IS HEREBY STIPULATED between counsel for the respective parties herein that the printed record herein shall contain the following, viz.:

Information; minute entries of January 26th and 29th, 1929; judgment; bill of exceptions; minute entry of February 14th, 1929; order extending time; petition for appeal and order allowing same; assignment of errors; citation; praecipe for transcript, and this stipulation.

IT IS STIPULATED that a bond on appeal was duly approved by the Court and filed herein

and that same need not be included in the printed record.

Dated this 25th day of February, 1929.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Appellant.
WELLINGTON D. RANKIN,
United States Dist. Atty.
By HOWARD A. JOHNSON,
Asst. U. S. Dist. Attorney.

Filed February 25, 1929. [71]

THEREAFTER, on February 25, 1929, praecipe for transcript of record was duly filed herein, being in the words and figures following, to wit:

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT OF RECORD.

To C. R. Garlow, Clerk of Above Court:

Please prepare a transcript of the record for the purpose of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, and include the following:

Information, filed Nov. 1, 1928.
Minute entries of January 26, 1929; January 29, 1929.
Judgment, filed January 29, 1929.
Bill of exceptions of defendant.
Minute entry February 14, 1929.
Order extending time.

Petition for appeal.
Order allowing appeal.
Assignment of errors.
Citation.
Stipulation re record.
This praecipe.

LESTER H. LOBLE,
HUGH R. ADAIR,
Attorneys for Appellant.

Service of foregoing and receipt of copy admitted this 25th day of February, 1929.

HOWARD A. JOHNSON,
Asst. U. S. District Attorney.

Filed February 25, 1929. [72]

THEREAFTER, on February 27, 1929, citation on appeal, issued by the Court on February 12, 1929, was duly filed herein, the original citation being hereto annexed and being in the words and figures following, to wit: [73]

(Title of Court and Cause.)

CITATION ON APPEAL.

United States of America, to United States of America, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, thirty days from and after the day this citation

bears date, pursuant to an appeal allowed herein and filed in the office of the Clerk of the District Court of the United States for the District of Montana, at Helena, on the 12 day of Feb., 1929, upon the petition of the defendant, Carl Herter, and to show cause, if any there be, why the judgment rendered against the said Carl Herter as in said appeal mentioned should not be reversed and corrected and why speedy justice should not be done the parties in that behalf.

Dated this 12 day of Feb., 1929.

BOURQUIN,
Judge.

Service of the foregoing citation admitted and receipt of copy thereof acknowledged this 12 day of February, 1929.

WELLINGTON D. RANKIN,
United States Attorney.
By ARTHUR P. ASHER.

Filed February ——, 1929. [74]

[Endorsed]: Filed Feb. 27, 1929. [75]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court of Montana, do hereby certify and return to the Honorable the United States Circuit

Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 75 pages, numbered consecutively from 1 to 75, inclusive, is a full, true and correct transcript of the record and proceedings in the within entitled cause, and all that is required, by praecipe filed, to be incorporated in said transcript, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation on appeal issued in said cause.

I further certify that the costs of said transcript of record amount to the sum of $14.95, and have been paid by the appellant.

WITNESS my hand and the seal of said court at Helena, Montana, this 1st day of March, 1929.

[Seal] C. R. GARLOW,
Clerk.
By H. H. Walker,
Deputy Clerk.

[Endorsed]: No. 5751. United States Circuit Court of Appeals for the Ninth Circuit. Karl Herter, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed March 4, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 5751

United States
Circuit Court of Appeals
For the Ninth Circuit

KARL HERTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

LESTER H. LOBLE
HUGH R. ADAIR
Attorneys for Appellant,
Helena, Montana

Filed.....1929

.....Clerk.

No. 5751

United States
Circuit Court of Appeals
For the Ninth Circuit

KARL HERTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellant

This is an appeal from an order denying appellant's petition for the return of articles and property seized under a search warrant which had been quashed as invalid, and from a judgment of conviction and sentence of appellant for possession of intoxicating liquor.

THE FACTS

The evidence, upon which appellant was convicted, was procured by a search of appellant's residence at No. 34 North Benton in Helena, Montana (R. p. 62).

Mr. Herter, his wife, two daughters and the mother of Mrs. Herter were in the home and occupying it as such at the time of the search (R. p. 62).

The federal prohibition agents conducting the search were armed with a search warrant (R. pp. 18-21), regular on its face, issued at Great Falls, Montana, by Wilmer Jeannette, a United States Commissioner, residing in the city last named (R. pp. 25, 32, 36).

The search warrant was issued by said Commissioner upon the affidavit of one "B. M. Sharp" (R. pp. 23, 24). The affidavit alleges a "buy" stating that "on the 24th day of September, 1928" affiant "purchased a number of drinks of intoxicating liquor, to-wit: whiskey and beer, from Carl Herter and for which he paid the said Carl Herter at the rate of 25c per drink" (R. p. 23).

The search warrant was served in Helena, Montana, on Friday evening, Oct. 5th, 1928, at about 6 o'clock P. M. (R. p. 32) and six cases of beer, two gallons of whiskey and five gallons of wine were seized at appellant's home (R. pp. 21, 22, 32). No

copy of the affidavit of "B. M. Sharp" was delivered to appellant (R. p. 26).

On the following day, viz: Saturday, Oct. 6th, 1928, appellant retained counsel, residing in Helena, to represent him (R. p. 33).

On Monday morning following, viz., Oct. 8, 1928, appellant's counsel called Commissioner Jeannette at Great Falls, Montana,—requested a copy of the affidavit of said "B. M. Sharp,"—advised of counsel's employment by appellant, and requested the commissioner to retain in his possession the said search warrant and affidavit until counsel could prepare and file with the commissioner a motion to quash and affidavits in support thereof, to which the commissioner agreed (R. p. 37).

Immediately thereafter, said commissioner advised counsel by long distance telephone that the officers had made and filed their return on said search warrant with him on Saturday, Oct. 6, 1928, and that he had, that day, forwarded same and all papers connected therewith to the clerk of the U. S. District Court at Helena (R. p. 34).

Thereupon and on Monday, Oct. 8, 1928, counsel ascertained that said papers were that day filed in the office of said clerk and obtained therefrom a copy of the affidavit of said "B. M. Sharp" on which said search warrant was based (R. p. 38) which

affidavit was then and there read by appellant (R. p. 34).

Thereupon and on Tuesday, Oct. 9, 1928, appellant filed in the U. S. District Court his petition denying the allegations contained in said affidavit of "B. M. Sharp" and praying for the remission of said search warrant, affidavit and papers to the commissioner that issued said warrant and for leave to file a motion to quash said warrant and to controvert the grounds on which the warrant was issued pursuant to Section 625, Title 18, U. S. C. A. (R. pp. 25-30). This petition was supported by affidavits filed showing the above recited facts (R. pp. 31-40).

On Dec. 1, 1928, the Honorable Charles N. Pray, District Judge before whom said petition was pending, granted the relief prayed for and ordered the search warrant, affidavit, etc., remitted to the commissioner issuing said warrant and granted appellant leave to controvert, before said commissioner, the grounds on which said warrant was issued (R. pp. 40-41).

Thereafter appellant filed with said commissioner his petition to quash said search warrant and controverting the grounds on which it issued (R. p. 42). Hearing was originally set for Dec. 15, 1928, and upon request of the district attorney was con-

tinued to Jan. 5, 1929, when a hearing was had before said commissioner (R. p. 43).

Appellant caused a subpoena to be issued for said "B. M. Sharp" and delivered same to the U. S. marshal for service. The marshal was unable to locate "B. M. Sharp" and made his return to that effect. "B. M. Sharp" was not present at the hearing (R. p. 49).

Twelve witnesses gave testimony at the hearing before the commissioner in direct contradiction to the uncorroborated affidavit of "B. M. Sharp" (R. p. 49) and the commissioner thereupon on Jan. 17, made certain findings of fact and conclusions of law (R. pp. 42-50) and found that there was no probable cause for the issuance of said search warrant (R. p. 50).

The commissioner, accordingly, ordered that the search warrant be quashed,—that the evidence obtained thereunder be suppressed and that the liquor and articles seized thereunder be delivered to the District Court for such disposition as may be proper (R. p. 50).

The commissioner on Jan. 18, 1929, returned and filed said search warrant and all papers connected therewith to the Clerk of the District Court together with his report and a typewritten transcript of the

testimony of the witnesses properly subscribed (R. pp. 41-50).

In the meantime, and while the foregoing matters were pending, an information was filed charging appellant, in two counts, with violating the National Prohibition Act on Oct. 5, 1928, the date of the search (R. pp. 1-4).

On Jan. 21, 1929, appellant filed in the District Court a petition to restrain the district attorney and prohibition director from using in evidence the articles and information obtained in the above search of defendant's dwelling and for a return to him of all property taken under and by virtue of said search warrant (R. pp. 50-55).

The above petition was noticed for hearing for Jan. 24, 1929 (R. pp. 56, 57), but upon motion of the district attorney was "continued until the day of trial" (R. p. 4).

The above petition was made upon the files and records of the case and the proceedings had before the Honorable Charles N. Pray, District Judge, and before Commissioner Jeannette and upon the findings of fact, conclusions of law and orders made by said commissioner pursuant to Sections 625 and 626, Title 18, U. S. C. A. (R. p. 55).

Thereafter, on Jan. 29, 1929, the date of the trial, the above petition was presented to the court in ad-

vance of appellant's trial (R. pp. 57, 58). The petition was overruled and denied and exceptions taken (R. pp. 57-58).

Upon the government's calling its first witness appellant objected to the introduction of any evidence upon the grounds (a) that the search warrant, under which the search was made, had been ordered quashed, (b) that the search was illegal and (c) that there was no probable cause for the issuance of the warrant. This objection was overruled and exception taken (R. pp. 59, 60).

The four federal prohibition agents, who, on Oct. 5, 1928, conducted the search of appellant's residence under the aforesaid invalid search warrant, testified on behalf of the government. At the conclusion of the testimony of each, appellant moved that all such testimony be stricken. The motions were, by the court, denied and exceptions taken (R. pp. 61, 63, 64, 65, 66).

Appellant offered in evidence the order of Judge Pray dated Dec. 1, 1928 (R. pp. 40, 41) and the findings and conclusions of the commissioner issuing the warrant, made pursuant thereto, dated Jan. 17th (R. pp. 42-50). The trial court rejected this evidence, to which rulings appellant excepted (R. pp. 66, 67).

Appellant rested and moved to dismiss the first count charging possession upon the ground that there is no evidence of any sale, or, that the liquor was unlawfully possessed, or, that it was possessed for any purpose of violating the National Prohibition Act. The motion was denied and exception taken (R. p. 68).

Appellant requested the court to give six instructions, three of which apply to the first count of the information. The court gave none of the offered instructions (R. pp. 70, 73, 74).

The jury returned a verdict of guilty as to possession and not guilty on the nuisance charge (R. p. 7) and the court rendered its judgment of conviction on such verdict (R. pp. 8, 9).

This appeal is from the order denying appellant's petition for a return of the property seized, etc., and from the judgment so made and rendered (R. pp. 8, 9).

THE ISSUES

The questions involved are:

1. Can appellant's conviction be sustained upon the evidence herein, all of which was obtained by federal officers in executing a search warrant held by the commissioner issuing same to be invalid and by him ordered quashed?

2. Should articles and property seized and taken from appellant under an invalid search warrant be returned to him upon proper application made?

3. Were the remarks of the court to appellant's counsel during the course of the latter's argument to the jury prejudicial?

4. Was the court's charge to the jury relative to the law applicable to the possession count erroneous?

5. May appellant be convicted of unlawful possession of liquor in his home in the absence of any evidence of intent to violate the law by barter, sale, or transportation thereof?

ASSIGNMENT OF ERRORS

The District Court erred:

2. In denying defendant's said petition.

3. In overruling defendant's objection to the introduction of any evidence at the trial herein.

4. In denying defendant's motions to strike the testimony of the witnesses: (a) Paul Reed, (b) Orville Jones, (c) J. Q. Adams, and (d) Donald Dibble.

5. In sustaining the government's objection to the introduction, in evidence, of the commissioner's findings of fact and conclusions of law relative to the absence of probable cause for the issuance of the search warrant herein.

6. In denying the defendant's motion to dismiss the first count of the information herein.

7. During the course of defendant's argument to the jury and when counsel said: "Section 33 of the National Prohibition Act says that it shall not be unlawful for one to possess intoxicating liquor in his private dwelling . . . ."

To remark:

"Provided he had it before prohibition went into effect. That is the law. Do not try to go outside of the law."

8. During the course of defendant's argument to the jury to remark: "The Court has admonished you to refrain from that line of argument. You better heed the admonition."

9. In failing and refusing to give to the jury defendant's offered Instruction No. 1.

10. In failing and refusing to give to the jury defendant's offered Instruction No. 2.

11. In failing and refusing to give to the jury defendant's offered Instruction No. 6.

12. To charge the jury as follows: "The National Prohibition Act says when it is made to appear that liquor was found in possession that the presumption is that it was unlawful possession and the presumption must be overcome or the jury must find, namely, the possession is unlawful. There is no lawful possession of liquor even in a private residence unless it was owned by the private party before

prohibition went into effect. One section is that those who had possession before prohibition went into effect did not need to report it to the Commissioner of Revenue, or whatever officer it was that was looking after *for* it, and he may still keep that liquor for himself or for his own guests, meaning the liquor that he owned before prohibition went into effect, and, if liquor is found it must be made to appear to the satisfaction of the jury that it was not in his possession unlawfully."

13. To charge the jury as follows: "The evidence is it was unlawful, moonshine and other liquors—the presumption is it was unlawful; in fact, he possessed it and the reputation of the place is it is a place where liquor is kept and sold."

14. In sustaining the government's objection to the introduction in evidence of the order made on December 1, 1928, by the Hon. Chas. N. Pray, District Judge, remitting the search warrant herein to the commissioner issuing the same for further proceedings and granting defendant leave to controvert the grounds on which said warrant was issued.

15. In holding that the search of defendant's private dwelling was legal.

16. There is no evidence, lawfully obtained, to sustain the verdict.

17. The verdict is against the law.

18. It was error to give and render judgment against the defendant on such verdict.

ARGUMENT

Appellant, pursuant to Sections 625 and 626, Title 18, U. S. C. A., challenged, before the commissioner issuing the search warrant, the truth of the statements contained in the affidavit of "B. M. Sharp" upon which affidavit the warrant was issued.

See:

U. S. v. Madden, 297 Fed. 679
Cogen v. U. S., 278 U. S. 226, 49 S. Ct. 120, 73 L. Ed. 158
U. S. v. Ephraim, 8 F. (2d) 512
U. S. v. McKay, 2 F. (2d) 257
In re Oryell, 28 F. (2d) 639
Cost v. U. S., 27 F. (2d) 511.

Pursuant to the above sections and in conformity to an order made by District Judge Charles N. Pray herein (R. pp. 40, 41), the commissioner proceeded to take testimony in relation to appellant's motion to controvert and after hearing had, found there was no probable cause for the issuance of the search warrant and ordered it quashed (R. p. 50).

Although reviewable (*Atlanta Enterprise v. Crawford*, 22 F. (2d) 834), no exception was saved nor appeal taken from the findings and order of the commissioner.

See:

Perlman v. U. S., 247 U. S. 7, 13, 38 S. Ct. 417, 62 L. Ed. 950

As was said in Pappas v. Lufkin, 17 F. (2d) 988, at p. 991,

> "In this circuit it has recently been held that the determiantion of the commissioner as to the existence of probable cause is conclusive, unless clearly arbitrary."

In United States v. Ephraim, (D. C.), 8 F. (2d) 512, the court said:

> "I have heretofore consistently ruled that I would not review the decision of a commissioner upon a pure question of fact. I think a commissioner, in determining questions of fact tending to show probable cause, acts in a judicial capacity, and that his acts, in so far as they involve questions of fact, are not reviewable by the court. They may be reviewed on questions of law. * * * *
>
> "The claimant or person from whom the property is seized is given a day in court, the warrant in the first instance being issued ex parte, and has a right to the independent judgment of the commissioner issuing the warrant if desired. The judge, who may be called upon later to try offenders from whom the seizure was made, cannot substitute his judgment on a question of fact so raised for that of the commissioner.
>
> "However, the question before the commissioner should be raised by appropriate proceeding. It can be raised only by the person from whom the property is taken or the owner thereof in a proceeding seeking to quash the search warrant."

In United States v. McKay, (D. C.), 2 F. (2d) 257, at p. 260, the court said:

> "The only officer who is authorized under Sections 15 and 16 to take testimony in relation

to the grounds on which the search warrant is issued is the judge or commissioner who originally issued the warrant.

"I find nothing in the statute which authorizes such an investigation by the District Court."

The commissioner's findings determined the illegality of the search warrant. These findings may not be arbitrarily disregarded.

See:

In Re Oryell, 28 F. (2d) 639
United States v. Elliott, 3 F. (2d) 496

The trial judge was without authority to circumvent the commissioner's findings made pursuant to an order of another judge of the same court and based upon the undisputed testimony of numerous witnesses (R. p. 43).

See:

Gardener v. U. S. (C. C. A. 9th), 13 F. (2d) 851
Hardy v. North Butte Mining Co. (C. C. A. 9th), 22 F. (2d) 62

It should not have been necessary for appellant to have filed a petition in the District Court to restrain the use of the evidence obtained under the illegal search warrant for the reason that the commissioner's return had already been filed in court and the district judge should have taken judicial notice thereof.

The search warrant having been determined invalid, appellant was entitled to the restoration of the

articles and property wrongfully taken from his possession by virtue of such warrant.

See:

Sec. 626, Title 18, U. S. C. A.
Fabri v. U. S. (C. C. A. 9th), 24 F. (2d) 185
Kohler v. United States (C. C. A. 9th), 9 F. (2d) 23
U. S. v. Madden, 297 Fed. 679
Brock v. U. S. (C. C. A. 8th), 12 F. (2d) 370
Honeycutt v. U. S. (C. C. A. 4th), 277 Fed. 939
Berkelhammer v. Potter (C. C. A. 1st), 23 F. (2d) 375 at p. 377.

In Cogen v. United States, 278 U. S. 226, 49 S. Ct. 120, 73 L. Ed. 158, the Supreme Court, referring to Section 626, Title 18, U. S. C. A., *supra*, said:

> "Congress made specific provision, by an independent proceeding, for the vacation of a warrant wrongfully issued and *for the return of the property.*" (Italics ours.)

Search Warrant Held Invalid

Assignments Nos. 2, 3, 4, 5, 6, 14, 15, 16, 17, 18

There is no intimation that the commissioner acted arbitrarily or that his findings are not supported by the facts. The commissioner's authority to act pursuant to the order of Judge Pray and Sections 625 and 626, Title 18, U. S. C. A., cannot be questioned. Hence it must follow that prejudicial error was committed by the trial court (a) in denying appellant's petition for restoration of the property seized; (b) in admitting over objection the evidence obtained

through the use of the invalid search warrant; (c) in denying appellant's motions to strike the testimony of the federal officers who conducted the illegal search; (d) in excluding the commissioner's findings and conclusions when offered in evidence; (e) in denying appellant's motion to dismiss as to the count charging unlawful possession; (f) in excluding the order made by Judge Pray authorizing appellant to file his motion to controvert with the commissioner and ordering the search warrant proceeding remitted for that purpose; (g) in holding the search made under the invalid search warrant as legal, and, (h) in permitting the rendition of a verdict and judgment on the evidence so obtained being covered by appellant's assignments of error Nos. 2, 3, 4, 5, 6, 14, 15, 16, 17 and 18.

Remarks of the Court

Assignments Nos. 7 and 8

This court in Fabri v. U. S., 24 F. (2d) 185 at p. 186 said with regard to the possession of liquor in a private dwelling:

> "Possession there may be lawful or unlawful, depending upon the mode of acquisition or the intended use."

The Supreme Court in U. S. v. Berkeness, 275 U. S. 149, 48 S. Ct. 46, said:

> "Congress was careful to declare in the National Prohibition Act that mere possession of liquor in one's home 'shall not be unlawful'."

In Castro v. U. S., (C. C. A. 1st), 23 F. (2d) 263, the court said:

> "The possession of liquor in a private dwelling is not prima facie evidence that it is kept for an unlawful purpose. It is only when it is possessed elsewhere than in a private dwelling and without a permit, that its possession is prima facie evidence that it is kept unlawfully, Section 33, Title 2, first clause?"

In Geraghty v. Potter, 5 F. (2d) 366, the court said:

> "Section 33 of the act expressly declares that it shall not be unlawful to possess liquor in one's private dwelling, and to throw the burden of proving that such possession is lawful comes near depriving the possessor of his presumption of innocence, but possession elsewhere is, under the act, deemed to be prima facie unlawful."

In United States v. Kelley, (D. C.), 26 F. (2d) 717, the court said:

> "Under the provisions of Section 33 of the act, the possession of liquor in one's private dwelling for personal use is lawful."

Again in the same case:

> "The effect of the use of the words 'by him' and 'his' in Section 33 is to make possession in a private dwelling lawful as to any one except the person who is occupying and using the dwelling for other purposes than as a dwelling."

In the Petition of Shoemaker, (D. C.), 9 F. (2d) 170, the court said with reference to Section 33 of the Prohibition Act:

> "This is a rule of evidence, to be applied by the court under proper instructions to the jury on the trial of a case involving the alleged possession of liquor. This section recognizes, as other provisions of the Volstead Act do, that this becomes a matter of ultimate proof; that if the finding is that the liquors were kept for the purpose of being sold, bartered, or otherwise disposed of in violation of the law, then the possession would be illegal; otherwise, the possession would be legal. This is a question of fact, to be solved by a jury under the facts and the legal rules of evidence."

Has the trial court the power to delete Section 33 from the Prohibition Act?

Has counsel not the right, in defending one charged with the unlawful possession of liquors in his dwelling, to comment on the distinction made by Congress, by the Supreme Court, by Circuit Courts and by learned district judges, between lawful and unlawful possession?

Counsel, when interrupted by the court (R. p. 69), was correctly quoting from Section 33 of the National Prohibition Act. The trial court stated in the presence of the jury that this particular section says that it shall not be unlawful for one to possess intoxicating liquors in his own private dwelling,

> "Provided he had it before prohibition went into effect" (R. p. 69).

Section 33 *supra* contains no such provision and the trial court had no right to so advise the jury.

The words of the act, as counsel was about to say, are:

> "Provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein." (Sec. 50, Title 27, U. S. C. A.)

Counsel was quoting the section and not misquoting it. The jury might have well been led to believe that counsel was doing the latter when the court remarked:

> "The Court has admonished you to refrain from that line of argument. You better heed the admonition." (R. p. 69.)

The remark of the court first quoted was an erroneous statement of the law of possession and misleading to the jury. We submit that there was nothing in counsel's argument to occasion or justify the last quoted remark of the court. Each remark was prejudicial to appellant, being covered by assignments of error Nos. 7 and 8.

Instructions Refused

Assignments Nos. 9, 10, 11

The authority for appellant's offered Instruction No. 1 (R. pp. 73, 74), are:

Petition of Shoemaker, (D. C.), 9 F. (2d) 170
Fabri v. U. S., (C. C. A. 9th), 24 F. (2d) 185 at p. 186

Appellant's offered Instruction No. 2 (R. p. 74) is based upon the following authorities, viz:

Lyles v. State, 268 Pac. 999
Petition of Shoemaker, 9 F. (2d) 170

Offered Instruction No. 6(R. p. 74) is based upon the second sentence of Section 33 of the National Prohibition Act (Sec. 50, Title 27, U. S. C. A.)

The refusal to give these instructions or any, in substance, like them, is covered by Assignments Nos. 9, 10 and 11.

Possession Not Unlawful

Assignments Nos. 17 *and* 18

There is no evidence in the record "that the liquors were kept for the purpose of being sold, bartered, or otherwise disposed of in violation of the law" (*Petition of Shoemaker*, 9 F. (2d) 170), hence the verdict of guilty is against the law and the judgment rendered on such verdict is erroneous, being covered by Assignments Nos. 17 and 18.

Charge to Jury

Assignments Nos. 12 *and* 13

As is hereinbefore stated, possession of liquor in one's private dwelling may be lawful or it may be unlawful. The court's charge to the jury fails to

so state. It likewise fails to advise the jury under what circumstances the appellant's possession may be considered lawful. Clearly it was error for the court to charge the jury that:

> "There is no lawful possession of liquor even in a private residence unless it was owned by the private party before prohibition went into effect." (R. p. 71.)

Again it was error to charge the jury that:

> "The presumption is that it was unlawful possession and the presumption must be overcome or the jury must find, namely, the possession is unlawful." (R. p. 71.)

See:

Sec. 50, Title 27, U. S. C. A.
United States v. Kelly, 26 F. (2d) 717
Castro v. U. S., (C. C. A. 1st), 23 F. (2d) 263
Street v. Lincoln Safe Deposit Co., 254 U. S. 88
Petition of Shoemaker, 9 F. (2d) 170

The above are covered by assignments of error Nos. 12 and 13.

For the reasons above, the cause should be reversed.

Respectfully submitted,

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No. 5751

United States Circuit Court of Appeals

For the Ninth Circuit

KARL HERTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

WELLINGTON D. RANKIN,
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CASED CITED.

No. 5751

United States
Circuit Court of Appeals
For the Ninth Circuit

KARL HERTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Brief of Appellee

This case is virtually the converse of its companion case, No. 5752. In that case appellant ignored the commissioner and made his objection in the District Court, before which nothing was pending. In this case appellant ignored the District Court's jurisdiction, and caused the search warrant to be quashed by the commissioner, beyond whose jurisdiction the matter had already gone. Clearly appellant was wrong in both instances.

THE FACTS.

Appellant's statement of facts in his brief filed herein is substantially correct except as to one matter. On page 5 he says, with reference to the commissioner's hearing upon the motion to quash:

> "Twelve witnesses gave testimony at the hearing before the commissioner in direct contradiction to the uncorroborated affidavit of "B. M. Sharp" (R. p. 49).

The sentence referred to in the commissioner's findings (R. p. 49), apparently bears out appellant's summary, but the balance of the commissioner's findings (R. pp. 46, 47, 48), shows that the said conclusion was entirely unwarranted and inaccurate. The only direct contradiction to the affidavit of sale was appellant's denial and the testimony of members of his household. This is clearly shown by the commissioner's findings (R. pp. 47, 48):

> "The testimony of Elizabeth Herter, Mary Herter, Anne Sailer, and Mrs. Mary E. Herter, was introduced to the effect that all of these witnesses were present on the premises during all or some portion of the particular day in question, either one, two or more of the said witnesses being on the premises at all times during the day, and that during the periods that the defendant was at home that neither B. M. Sharp, who is unknown to them, or any other man visited the said premises, and that there was no sale of any kind to the said B. M. Sharp or to any other persons. These witnesses testified further that the said B. M. Sharp, did not visit the said premises during the said day, and that there was no other strange person who visited the premises during the said day, nor was there any sale of intoxicating liquor upon the said premises during the said day.

> The testimony of these witnesses corroborates the testimony of the defendant himself with regard to the sale of intoxicating liquor, or the visit of B. M. Sharp or any other person at the premises during such time as the defendant himself was at home during that particular day."

The other seven witnesses merely testified to appellant's presence elsewhere during portions of the day, and their statements cannot possibly be construed as "in direct contradiction" to the affidavit of sale. The commissioner's determination of the fact question was clearly wrong.

This would be significant in judging the credit and weight to be given the commissioner's action if that action were entitled to any consideration whatever.

COMMISSIONER'S ACTION IN EXCESS OF JURISDICTION AND VOID.

As a matter of fact, however, it is very clear that the commissioner's action was outside of his jurisdiction and therefore entirely void.

It is apparent that the commissioner's power to quash a search warrant exists only while the matter is before him in the preliminary stages. Its purpose is to prevent the use of objectionable evidence in the preliminary proceedings before the commissioner, and after the matter has proceeded beyond that stage he has no further jurisdiction.

The case of U. S. v. McKay, 2 F. (2d) 257, is directly in point. There the defendant was not taken before the commissioner at all, but was arraigned in Dis-

trict Court upon an information filed directly therein. The court held that the commissioner was right in refusing to act upon the ground that he had no jurisdiction. The court said (p. 258):

> "It is wholly inconsistent with recognized rules of legal procedure that a commissioner, after a case has been removed from his jurisdiction, can determine what evidence may and what may not be presented in court. The information charging defendants with a violation of the National Prohibition Act has been filed in court. * * * Can it be contended that the commissioner, after the information had thus been filed, had the power to suppress the proof on which it was based, and on which the court acted? If the commissioner has such power, when does the right to exercise it cease? Can he thus act during or after the trial on the information in the District Court? These questions answer themselves."

The decision in this case should definitely settle once for all, the contention that the commissioner, a committing magistrate for preliminary matters, has continuing authority after those preliminary matters have been disposed of. It should settle once for all, the contention that such a magistrate, the appointee of the Court, has continuing power after a matter has reached that Court, to determine what evidence may be adduced therein.

No authority whatever can be found for such contentions, nor can any persuasive argument be presented therefor.

JUDGE PRAY'S ORDER INEFFECTIVE.

Appellant apparently relies upon the order of Judge Pray, one of the District Judges, purporting to remit the search warrant papers to the commissioner (R. p. 40).

It will be noticed that the order in question does not expressly purport to revest the commissioner with jurisdiction, but merely orders:

> "That the petitioner Karl Herter be and he is hereby given leave to take such other and further *proceedings before such Commissioner as may be lawful* to controvert the grounds on which the said warrant was issued." (Italics ours.)

Apparently no attempt was made to determine or to order what "proceedings before such commissioner" "may be lawful" at that stage of the case.

But if the intention was to revest jurisdiction in the commissioner, the order was entirely void. The commissioner's authority is entirely statutory and limited to preliminary matters. U. S. v. McKay, 2 F. (2d) 257; U. S. v. Ephraim, 8 F. (2d.) 512; U. S. v. Napela, 28 F. (2d) 898. There is no known authority under which the District Court can enlarge that jurisdiction. Nor is there any authority under which the District Court can divest itself of any part of its jurisdiction in such matters, or under which it can delegate to any officer the question of admissibility of evidence in matters before it. The commissioner's action was entirely *ultra vires* and void, despite the order of Judge Pray.

EXCLUSION OF OFFERED EVIDENCE NO ERROR.

The exclusion of Judge Pray's order and of the commissioner's findings and conclusions was therefore not erroneous, as those documents were of no effect.

And if erroneous the error was not prejudicial, for commissioner's proceedings in such matters are before the Court without being put in evidence (U. S. v. Casino, 286 Fed. 976) and the matter was for the court only and not for the jury.

In this connection it will be noticed that appellant also included in transcript (R. p. 25) his application and affidavit for Judge Pray's order, although they were not offered in evidence at all.

MOTION TO SUPPRESS NOT PROPERLY PRESENTED.

It is clear that the appellant's motion was not properly made before the District Court, for it was based, not on the alleged invalidity of the search, but on the fact that the commissioner had quashed the warrant. Appellant recognized that fact when he failed to present to the Court evidence of the supposed invalidity of the warrant, or even to offer in evidence the transcript of testimony taken before the commissioner. It may be that if appellant had properly moved the District Court to suppress the evidence he would have been entitled to present to it any proper testimony to show the

invalidity of the warrant and of the search. The decision in U. S. v. Napela, 28 F. (2d) 898, suggests that independent of Title 18 U. S. C. A. Secs. 625, 626, the defendant has such right. In any event, the matter having gone beyond the commissioner, appellant's remedy properly was to make his showing before the District Court. This he failed to do.

Even if the commissioner's action had validity, it was not final, conclusive or binding on the District Court. U. S. v. Madden, 297 F. 679; U. S. v. Casino, 286 F. 976; U. S. v. Deloic, 2 F. (2d) 377; U. S. v. Maresca, 266 F. 713; U. S. v. Jensen, 291 F. 668.

There can be no doubt that the admissibility of evidence is for the trial court and that it cannot be concluded by the commissioner's ruling. Therefore, if defendant objected to the admissibility of evidence he should have made proper objection and showing before the District Court. This he did not do.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

The possession of beer, wine and whiskey in appellant's house was prima facie unlawful.

Section 33 of the National Prohibition Act, Title 27, U. S. C. A., Section 50, reads as follows:

> "The possession of liquors by any person not legally permitted under this chapter to possess liquor shall be prima facie evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished, or otherwise disposed of in violation of the provisions of this chap-

ter. But it shall not be unlawful to possess liquors in one's private dwelling while the same is occupied and used by him as his dwelling only and such liquor need not be reported, provided such liquors are for use only for the personal consumption of the owner thereof and his family residing in such dwelling and of his bona fide guests when entertained by him therein; *and the burden of proof shall be upon the possessor in any action concerning the same to prove that such liquor was lawfully acquired, possessed, and used.* (Oct. 28, 1919, c. 85, Title II, Sec. 33, 41 Stat. 317.)" (Italics ours).

It will be noticed that this section includes three propositions: First, that possession of liquor is prima facie unlawful; Second, that possession in one's dwelling is not unlawful under certain *fact* situations; Third; that the burden shall be upon the possessor in *all* instances "to prove that such liquor was lawfully acquired, possessed, and used."

Singleton vs. U. S. (C. C. A., S. C. 1923) 290 F. 130.

Mason vs. U. S. (C. C. A. Ill. 1924) 1 F. (2d) 279, Certiorari denied (1924) 45 S. Ct. 97, 266 U. S. 611, 69 L. Ed. 467.

Filippelli vs. U. S. (C. C. A., 9th Circuit), 6 F. (2d) 121, 125.

Barker vs. U. S., (C. C. A. 4th Circuit) 289 F. 249.

Under the statute quoted above there is no presumption that possession of intoxicating liquor in a home is lawful; on the contrary the presumption is that the possession is unlawful, unless the special permitted purpose is shown as a matter of fact; and this

presumption is so strong that the burden is upon the possessor to prove the lawfulness, not only of the possession and use, but also of the acquisition.

In the present case appellant presented no evidence of any kind to show the lawfulness of his acquisition, possession or use of the liquor in question. His affidavit attached as Exhibit "B" (R. p. 31) to his petition for remission of papers to commissioner (R. p. 25) states certain conclusions as to the purpose for and use of the liquor, but neither the said application nor the affidavit was offered in evidence, and the same are not properly in the record or before this Court on appeal. And the said papers make no reference at all to the manner of acquisition of the liquor.

Against this failure of appellant to show the lawfulness of his possession, use or acquisition of the intoxicating liquor is the affidavit for search warrant showing the sale of liquor at the premises, the return on the search warrant in evidence (R. p. 60), showing (R. p. 21), the seizure of *home brew* beer; the testimony of Agent Reed (R. pp. 60, 61) showing the finding of 264 quarts of *home brew beer*, five gallons of wine and two gallons of whiskey; the testimony of Agent Jones (R. p. 63) showing the finding of 261 quarts of *home* beer, two gallons of *moonshine* whiskey, and five gallons of wine; the testimony of Agent Adams (R. p. 64) showing the finding of that amount of *home brew* beer, whiskey and wine; and the testimony of Agent Dibble as to the amount found.

We thus have an affirmative showing of *moonshine* whiskey and *home brew* beer, which could not have been lawfully acquired, used or possessed; furthermore, the amount found would negative possession for mere family use.

Not only was the possession clearly unlawful, but appellant made no effort to show the lawfulness thereof.

NO PREJUDICIAL ERROR IN THE COMMENTS OR INSTRUCTIONS OF THE COURT.

There was therefore no prejudicial error in the comments or instructions of the court under the facts of the case. The evidence showed a possession of liquor that could not have been lawfully made, acquired, used or possessed, and in amounts negativing any lawful use. Under those facts the comments and instructions were correct, or if not correct any error was non-prejudicial.

NO ERROR IN DENYING OFFERED INSTRUCTIONS 1, 2 OR 6.

Appellant's offered instructions 1, 2 and 6, and each of them, were clearly inaccurate and as clearly not applicable to the facts shown.

Furthermore, the record shows no exception to the Court's refusal to give the said instructions, or any of them. Appellant is therefore in no position to complain.

For these reasons the judgment should be affirmed.

Respectfully submitted,

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No. 5751

22

United States
Circuit Court of Appeals
For the Ninth Circuit

KARL HERTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION OF APPELLANT FOR REHEARING

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Filed.....1929

.....Clerk.

No. 5751

United States
Circuit Court of Appeals
For the Ninth Circuit

KARL HERTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION OF APPELLANT FOR REHEARING

Now comes Karl Herter, appellant, and respectfully petitions for a rehearing for the reasons:

1. That the decision is in conflict with:
   United States v. Elliott, (C. C. A. 9th), 5 F. (2d) 292
   United States v. Napela, 28 F. (2d) 898
   Doran v. U. S., (C. C. A. 9th), 31 F. (2d) 754

2. That the decision fails to distinguish between the statutory rights granted appellant by Sections 625 and 626 of Title 18 U. S. C. A. for relief before the commissioner issuing the warrant and the constitutional guarantees of the Fourth and Fifth Amendments to the Federal Constitution which guarantees must be asserted before the district court.

   United States v. Napela, 28 F. (2d) 898 at p. 903
   United States v. Ephraim, 8 F. (2d) 512 at p. 513

Argument and Authorities

This court in its opinion says,

> "that inasmuch as the Espionage Act purports to confer on a commissioner not the power to quash the warrant or to suppress the evidence but only to make disposition of the property, it is inoperative within the realm of the Prohibition Act."

In United States v. Elliott, 5 F. (2d) 292 at p. 294 this court, in construing the provisions of the Espionage Act in an intoxicating liquor case, said:

> "These several sections and provisions are explicit, and when construed in connection with the Fourth Amendment, they not only define the limits of the power of the commissioner in issuing a search warrant, but they also clearly imply that one may go before the commissioner and controvert the grounds upon which the warrant was issued, and, if it appears that the property or paper which has been seized is not that which was described in the warrant, or that there was no probable cause for believing the existence of the grounds upon which the commissioner issued the warrant, may have such property or paper restored to him by order of the commissioner.
>
> "Appellant herein advances no sufficient reason for not having followed the course outlined. He therefore makes no cause for the issuance of a writ of certiorari."

In the recent case of United States v. Napela, (D. C.) 28 F. (2d) 898 the court said:

> "It is apparent from sections 625 and 626 that their purpose, apart from the later limitations of the Prohibition Law, is to give persons from whom things are seized under a search warrant prompt remedies in the preliminary stages, viz: * * * and (2) a deter-

mination by the commissioner that the things seized were not intended to be seized, or were not lawfully seized, and that, therefore, *no evidence thereof can be offered by the government on the examination of the defendant before him, or any other commissioner before whom the case may be brought, on the criminal charge, if any, based on the possession of the seized articles.* * * *

"If the powers granted in sections 625 and 626 were not given to the commissioner who issued the search warrant, the accused could not have the return of property, either that not intended to be seized, or that unlawfully seized, or a determination by the commissioner, on the examination by him or by any other commissioner before whom the defendant may be taken, whether the seized articles were competent or incompetent evidence against him.

"True, application may be made to the court, as hereinafter shown, and the court can determine the legality of the seizure and the competence of the seized articles as evidence for the trial of the accused; *but this may be done only when a court is in session,* and, in the meantime, the accused might unjustly languish in jail, awaiting a term of the court, because of the inability of the defendant to furnish bail or inability to have the evidence against him on the examination before the commissioner confined to competent evidence.

"It is true that power to take proof on the question of probable cause for the issue of the search warrant and to quash the warrant is not given to the commissioner in the issuance of search warrants under any other provision of law, viz. to search for counterfeit money, smuggled goods, or property used for violation of the internal revenue laws.

"These are, however, statutes of long standing, and the search is limited to specific articles or kinds of

articles. Title 18 (U. S. C. A. §§611-633) was enacted as the Espionage Act of June 15, 1917, just after the United States entered into the World War. The statement of articles for which search might be made under the Espionage Act was very broad, and covered, among other things, any property or papers which might be used to aid a foreign government. The very breadth of the power of search under the Espionage Act doubtless caused the remedial provisions of sections 625 and 626 of title 18 to be given place in the act.

"The power of the commissioner, given to him in section 626 to title 18 (section 16, title 11 of the Espionage Act), to order the restoration of the seized articles, has been taken from him, so far as the restoration of intoxicating liquors is concerned, by title 2, §25, of the National Prohibition Act, which provides that such liquors shall be held 'subject to such disposition as the court may make thereof.' (citing cases)

"This leaves the power of the commissioner confined to only one of the two things he could otherwise determine, viz. the competency of the seized goods as evidence before him, or any other commissioner, on the examination of the defendant upon the charge of unlawful possession of intoxicating liquors under the Prohibition Law. *That the power of the commissioner to take proof of probable cause under these sections, as limited by section 25 of the National Prohibition Law, relates only to the use of the seized liquors as evidence by the government against the defendant for violation of the National Prohibition Laws, must be evident, for it can have no other purpose.* (citing case)." (Italics ours.)

In United States v. McKay, (D. C.) 2 F. (2d) 257, the court said at pp. 258,259:

> "A person from whose possession property is taken in execution of a search warrant has the undoubted right to avail himself of the remedies provided in sections 15 and 16, title 11, of the Espionage Act, in so far as they are not modified or withdrawn by section 25, title 2, of the National Prohibition Act provided he acts with reasonable diligence, and before the court takes jurisdiction."

In the instant case appellant acted promptly. He filed his petition for remission and leave to controvert on Oct. 9, 1928, (R. p. 25), being four days after the search (R. p. 21), only one day after filing of the search warrant and return (R. pp. 17, 19, 22) and *twenty-two days before* the jurisdiction of the district court attached by the filing of the information therein (R. p. 1).

In United States v. Ephraim, 8 F. (2d) 512 at p. 513, in construing the provisions of the Espionage Act, the court said:

> "It is true that section 16 contains provisions inconsistent with the Volstead Act, but they provide one of the steps required to be taken if the grounds on which the search warrant is issued are controverted. The claimant or person from whom the property is seized is given a day in court, the warrant in the first instance being issued ex parte, and *has the right to the independent judgment of the commissioner issuing the warrant if desired. The judge,* who may be called upon later to try offenders from whom the seizure was made, *cannot substitute his judgment on a question of fact so raised for that of the commissioner.*" (Italics ours.)

Evidence Excluded

This Court in its opinion says,

> "appellant has not brought here his petition to quash or *any part of the evidence taken* thereon but has incorporated in the record the commissioner's 'Report * * and Ruling'."

The findings, conclusions, ruling and decision of the commissioner were in appellant's favor. The government appeared before the commissioner. It did not question his jurisdiction. It submitted to his jurisdiction and produced its witnesses and evidence. The government saved no exception to the ruling and decision of the commissioner. It perfected no appeal therefrom. It asked for no review of the proceedings. At the trial in the district court the government did not introduce nor even offer the testimony taken at the hearing before the commissioner.

Why should the appellant incorporate, in his record to this Court, the testimony upon which the commissioner's order was based? Why should appellant appeal from an order, in his favor, made by the commissioner?

In the recent case of Doran v. United States, (C. C. A. 9th), 31 F. (2d) 754 this court said:

> "A motion seasonably made for the suppression of part of the evidence on the ground that it was obtained through an unlawful search, was heard upon affidavits and oral testimony prior to the trial, and denied. *The testimony so adduced is not brought here by bill of exceptions or otherwise and the order is therefore not open to review.*" (Italics ours.)

The review of an order *granted* rests on no different grounds or record than the review of an order *denied.*

The government should have excepted to the commissioner's order if improper and should have shown to the

district court wherein the order was not supported by the sworn testimony taken before the commissioner.

In U. S. v. Napela (D. C.) 28 F. (2d) 898 the court said:

> "When a person is granted a right to be asserted in a tribunal, and he neglects to assert that right while before such tribunal, he must be deemed to have waived that right. This should also be so when a person is granted a right to be asserted before a quasi judicial officer vested with certain judicial discretion, and fails to assert that right while before such officer. Such a right is a statutory right, irrespective of its duration and may undoubtedly be waived like other statutory 'rights'."

Again in the Napela case:

> "The statutory rights granted by sections 625 and 626 must not be confused with the constitutional guarantees of the Fourth and Fifth Amendments to the Federal Constitution. Sections 625 and 626 were not enacted until 1917, but the rights granted by the Fourth and Fifth Amendments have existed since the adoption of these amendments. It is the duty of the courts to enforce these constitutional rights, *but the commissioner has no power in respect thereto.*" (Italics ours.)

In the instant case it must be remembered that appellant Herter was asserting before the commissioner a statutory right accorded him by sections 625 and 626 of title 18, U. S. C. A.

The district judge excluded as "immaterial and incompetent" (R. p. 67) the offered order of Judge Pray and the findings of fact and conclusions of the commissioner (R. pp. 66, 67). Neither were admitted in evidence by the district court.

The testimony on which the commissioner's findings and conclusions are based was not offered by the government nor was it incorporated in the bill of exceptions or record brought to this court.

Can this court, without having before it a scintilla of the evidence or testimony offered at the commissioner's hearing hold that,

> "The commissioner excluded from his consideration entirely all evidence of the reputation of the place."

The trial court based his exclusion of the commissioner's ruling on no such grounds as the foregoing.

Oft times the testimony is much stronger and more convincing than it appears from the brief resume thereof set forth in the opinion of the commissioner or judge who considered same.

As was said in United States v. Madden, 297 Fed. 679 cited by this court in its opinion,

> "as in the case of master, referee, or other ministerial officer of the court, the conclusions of the commissioner should be upheld, unless clearly wrong."

No Rebuttal Testimony

In the opinion this court says:

> "Two prohibition agents testified that at all times mentioned the residence bore the common reputation of being a place where intoxicating liquor was sold and one witness, an attorney for appellant, *testified in rebuttal* on this point.

The writer hereof is the attorney referred to. He did not testify *in rebuttal*. There was no rebuttal testimony offered.

The record shows that the government offered the testimony of three witnesses in support of its case viz. Roberts, Jones and Adair (R. p. 44), that two of these government witness testified that the dwelling has the reputation of being a place where liquor is sold and that the third witness,

> "called by the United States District Attorney as a witness, testified that the place has not had such a reputation since June, 1928, and that the reputation of the place is good." (R. p. 48).

The United States District Attorney saw fit to call the witness Adair without subpoena, warning or notice to the witness. The government impliedly vouched for his veracity and asked that the commissioner accept and believe his testimony. This the commissioner did.

Under these circumstances can the government complain if the commissioner sees fit to believe the testimony of this one government witness and to disbelieve the testimony of the other two witnesses offered by the government?

Can it be justly said that in this state of the record the commissioner committed a breach of his duty as an officer by

> "excluding consideration of testimony touching reputation and erroneously holding that the warrant affidavit was directly contradicted by twelve witnesses"?

Reputation of Private Dwelling

One may not obtain a search warrant for a private dwelling by filing an affidavit that the dwelling has the *reputation* of being a place where liquor is sold.

In United States v. A Certain Distillery, 24 F. (2d) 557

at pp. 558, 559 in speaking of section 25 of the Prohibition Act the court said:

> "The restriction in section 25 confines the issuance of warrants for the search of private dwellings to two specific instances, viz.: Where such dwelling is 'used for the unlawful sale of intoxicating liquor'; or where such dwelling is 'in part used for some business purpose such as a store, shop, saloon, restaurant, hotel, or boarding house."

In Bell v. United States (C. C. A. 9th) 9 F. (2d) 820, this court, considering the validity of a search warrant, said that,

> "it was confessedly void, because issued to search a private dwelling occupied as such without any proof that the dwelling was used for the unlawful sale of intoxicating liquor."

An unlawful sale of intoxicating liquor may not be shown by the reputation of the dwelling although such evidence would be admissible to support the charge of maintaining a nuisance therein.

See:

English v. United States, (C. C. A. 8th), 30 F. (2d) 518
Lambert v. United States, (C. C. A. 9th), 26 F. (2d) 773

In other words, *probable cause* is shown by a positive averment that affiant has first-hand knowledge that liquor was sold in the home and not by what reputation others may have given to the home.

See:

U. S. v. Berkeness, 48 S. Ct. 46, 72 L. Ed.
Wagner v. U. S. (C. C. A. 8th), 7 F. (2d) 861
Thompson v. U. S. (C. C. A. 4th), 22 F. (2d) 134
U. S. v. Boscarino, (D. C.) 21 F. (2d) 575
Proulk v. U.S. (C.C.A. 1st) 32 F. (2d) 760
U. S. v. Gokey. 32 F. (2d) 793

In the instant case unless Sharp actually purchased liquor in appellant's home there was no *probable cause* for the issuance of the warrant. See: Dickhart v. U.S. 16 F.(2d) 345

The government did not produce Sharp or cause any subpoena to issue for him or attempt to account for its failure so to do.

Appellant caused a subpoena to issue for Sharp and to be placed in the hands of the United States marshal for service but the marshal was unable to locate him. (R. p. 49).

Sharp did not and will not face appellant or appellant's witnesses. Sharp doubtless is familiar with the "sections declaring that a false oath in connection with the procuring of a search warrant shall be subject to the law of perjury" as is set forth in the opinion herein.

The testimony of Sharp, the alleged purchaser, would have been the best evidence the government could produce. It must, like any other litigant, produce its best evidence or satisfactorily account for its failure so to do. It may not hide its case behind a hidden accuser who will not face the accused or submit to cross examination.

Conclusion

No warrant shall issue for the search of a private dwelling occupied as such except upon *probable cause.*

See:

4th Amendment U. S. Constitution
Sec. 613 Title 18 U. S. C. A.

Under the National Prohibition Act a search warrant

may issue as provided in sections 611 to 631 and 633 of Title 18 U. S. C. A. being the Espionage Act of 1917.

See:

Sec. 39 Title 27 U. S. C. A.

A search warrant may be issued by a United States District Judge, a United States Commissioner, or a state magistrate.

See:

Sec. 611 Title 18 U. S. C. A.

Before the commissioner can issue a search warrant for a private dwelling he must first be satisfied and determine that *probable cause* exists for the issuance of the warrant.

See:

Secs. 614, 615, 616, Title 18 U. S. C. A.

Probable cause for the search of a private dwelling is shown in the first instance by proof of a sale or sales of intoxicating liquor in the dwelling.

See:

Sec. 39 Title 27 U. S. C. A.
U. S. v. A Certain Distillery, 24 F. (2d) 557 at pp. 558, 559.
Bell v. United States (C. C. A. 9th) 9 F. (2d) 820
U. S. v. Berkeness, 275 U. S. 149
Byars v. U. S. 273 U. S. 28

Can it be that a commissioner who has been misled into believing there was *probable cause* for the issuance of a search warrant cannot hear a party injured thereby who acts promptly in bringing the true facts to the attention of the commissioner?

Can it be that a commissioner has the power to find the *presence* of probable cause, but he has not the power to find its *absence?*

Has a commissioner no power to quash a search warrant which he has issued when, before a criminal prosecution is begun in the district court thereon, he finds that the true facts are not as first represented to him and that in truth and in fact no *probable cause* existed for the issuance of the warrant?

For the foregoing reasons appellant respectfully petitions for a rehearing herein.

Respectfully submitted,

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CERTIFICATE

This is to certify that the foregoing petition is, in my judgment, well founded, and I further certify that said petition is not interposed for delay.

Hugh R. Adair
Of Counsel BO.